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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION  
CASE NO. 16-CV-80655-ROSENBERG

<b>JAMES TRACY,</b>	.	
Plaintiff,	.	
vs.	.	
<b>FLORIDA ATLANTIC UNIVERSITY</b>	.	West Palm Beach, Florida
<b>BOARD OF TRUSTEES,</b>		
		December 7, 2017
Defendant.	.	

VOLUME 7

JURY TRIAL PROCEEDINGS  
BEFORE THE HONORABLE ROBIN L. ROSENBERG  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	<b>LOUIS LEO, IV, ESQ.</b>
	<b>JOEL MEDGELOW, ESQ.</b>
	<b>MATTHEW BENZION, ESQ.</b>
	<i>Florida Civil Rights Coalition, PLLC</i>
	4171 W. Hillsboro Boulevard
	Suite 9
	Coconut Creek, FL 33073
	954-478-4223
	<b>STEVEN M. BLICKENSDEFFER, ESQ.</b>
	Carlton Fields P.A.
	100 S.E. Second Street
	Suite 4200
	Miami, Florida 33131
	305-539-7340

FOR THE DEFENDANT:

**G. JOSEPH CURLEY, ESQ.**

**HOLLY L. GRIFFIN, ESQ.**

**ROGER W. FEICHT, ESQ.**

**SARA N. HUFF, ESQ.**

*Gunster Yoakley & Stewart, P.A.*

777 S. Flagler Drive

Suite 500 East

West Palm Beach, FL 33401

561-655-1980

COURT REPORTER:

Pauline A. Stipes

Official Federal Reporter

HON. ROBIN L. ROSENBERG

Fort Pierce/West Palm Beach

772-467-2337

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1           *THE COURT:* Okay, good morning, everyone, you may be  
2 seated.

3           I learned, despite the multiple accidents on the  
4 highway, all the jurors are here.

5           *THE COURTROOM DEPUTY:* Except one.

6           *THE COURT:* So, I think you were going to give me  
7 something on Moats. Do I have a distillation of the remaining  
8 Moats disputes? If so, could you hand that up, please?

9           *MR. FEICHT:* Docket Entry 430.

10          *THE COURT:* Do you have a copy of it? Can you tell me  
11 what Docket Entry 430 is?

12          *MR. FEICHT:* What we promised to do last night, which  
13 is to take our original designations from the Defendants and  
14 remove those that we took out for cumulative purposes, remove  
15 those that we took out based on what was already covered in  
16 trial, or added things that were not covered in the Plaintiff's  
17 case in chief. Those are Plaintiff's designations for the  
18 first three witnesses that are going to appear by deposition,  
19 Dr. Tracy, Mr. Moats, and Mr. Johnson.

20          They have Plaintiff's original objections, but we have  
21 been working through those this morning and have narrowed the  
22 issues significantly. We narrowed everything from Dr. Tracy's  
23 deposition for the first key points, we have done that for Mr.  
24 Moats as well, and we are in the middle of going through Mr.  
25 Johnson.

1           *THE COURT:* You are calling Tracy first, so, what do I  
2 need to look at? Our jurors are here. What remains not  
3 resolved in Tracy?

4           *MR. LEO:* Louis Leo for the Plaintiff. A handful of  
5 objections to the remaining designations, much of the  
6 incomplete we resolved, and a lot of that has been removed as  
7 well. Would you like to address the objections that remain?

8           *THE COURT:* If I don't, what will happen?

9           You will be showing it, you have it on video. It  
10 would seem I would need to, right? Unless there is a way to  
11 play it without me addressing it. Don't I need to address it?

12           Which Tracy volume, what date and volume?

13           *MR. LEO:* May 2nd, 2012.

14           *THE COURT:* Volume 1 or 2?

15           *MR. LEO:* Volume 2 is where the first objection comes  
16 up.

17           *THE COURT:* Just a minute. I have the depo up.

18           *MR. LEO:* I believe it is 223, line 24.

19           *THE COURT:* Okay, just a minute. Page 223, line  
20 four -- I am sorry, 24. What is the page?

21           *MR. LEO:* 223.

22           *THE COURT:* Line 24. Who is asking the questions in  
23 this deposition?

24           *MR. LEO:* I believe Mr. Curley.

25           *THE COURT:* So Defense question: "If FAU were

1 concerned about the faculty and staff, would you agree they had  
2 a right to act on those concerns?" Object to form.

3 What is being objected to?

4 MR. LEO: It calls for speculation, your Honor.

5 THE COURT: If FAU was concerned about the safety of  
6 their faculty, would you agree they had a right to act on those  
7 concerns, and he ultimately says what time, 2013? What is his  
8 ultimate answer?

9 "Answer: In January 2013, yes, sir."

10 "What would be the cause of their sense of  
11 endangerment? Well, we could speculate about that. I guess  
12 threats, things of that nature, etc."

13 "Mr. Leo: Objection."

14 "Mr. Curley: Do they have a right to act on that if  
15 they think your blogging puts people at risk?"

16 Object to form.

17 "Is there evidence of that, that has been  
18 investigated?"

19 The witness ultimately says, "Well, I have been  
20 blogging for most -- before 2013, I began blogging for UFF when  
21 I was president, there was never any threats made to any  
22 members of the FAU community between '09 and '12. I was active  
23 online then."

24 What is objected to?

25 MR. LEO: 223, 24, through 226. We have no objection

1 to nine through 25 on 226, or two through seven. Counsel  
2 comments, "it's a crazy world, things happen" --

3 *THE COURT:* Can that be taken out, the lawyer's  
4 comment? That doesn't seem to be necessary.

5 *MS. HUFF:* We can take out the parts of speculating,  
6 but threats, they were testified to.

7 *THE COURT:* Line 16 to line 19 should come out on page  
8 224, that is the attorney talking. I am not sure if that was  
9 Mr. Curley or who, that should come out.

10 It seems to me that is the only -- what else is  
11 problematic? I agree, that should come out.

12 *MR. LEO:* That was my primary concern.

13 *THE COURT:* Let's take lines 16 through 19 out, and  
14 everything else would stay in on page 224 in that excerpt.  
15 What is the next issue that hasn't been resolved with Tracy?

16 *MR. LEO:* Your Honor, the next deposition, May 15.

17 *THE COURT:* Yes.

18 *MR. LEO:* 113.

19 *THE COURT:* Page 113, hold on. Page 113, okay, what  
20 about 113?

21 *MR. LEO:* We object under Rule 403, relevance --

22 *THE COURT:* What line?

23 *MR. LEO:* 113, 25, 114, one through ten.

24 *THE COURT:* "How did the Defendant Zoeller coerce you  
25 into submitting four years of constitutionally protected

1     blogging?"   That is Defense asking Plaintiff that?

2               MR. LEO:   Yes.

3               THE COURT:  He says, "He told me to submit the outside  
4     activity form and then we'll grieve."   That is Zoeller, the  
5     union person?

6               MR. LEO:   Yes.

7               THE COURT:  "He told me to submit the outside activity  
8     form and then we'll grieve."

9               "Was that the extent of his coercion?"

10              "We would grieve and I would be -- yes, I was being  
11     directed to submit the forms and there would be further  
12     discipline up to termination."

13              That is objected to?

14              MR. LEO:   Yes, he was referred to as the Defendant  
15     Zoeller.

16              THE COURT:  Can you take the word "Defendant" out on  
17     your video depo?  Let's take out the word "Defendant".

18              MS. HUFF:  It is possible to remove the word Defendant  
19     in the video.

20              THE COURT:  Line 25, page 113.

21              MR. FEICHT:  We can take that out.

22              MR. LEO:   The question is geared toward an allegation  
23     that is dismissed, the conspiracy count.  We have a problem  
24     with calling him a Defendant, but this is perhaps a trial  
25     within a trial, and they are trying to bring up conspiracy



1       allegations dismissed in this case.

2               *THE COURT:* Overruled. I have addressed that, there  
3       is no conspiracy coming in. It doesn't mean what relates to  
4       grieving or not grieving is not a part of this case, that is  
5       overruled.

6               What else?

7               *MR. LEO:* 165.

8               *THE COURT:* 165, what lines?

9               *MR. LEO:* Your Honor, just given your Honor's ruling,  
10       I don't think we have an objection to this any more.

11               *THE COURT:* Okay, withdrawn. Is that it from that  
12       depo?

13               *MR. LEO:* Yes.

14               *THE COURT:* What else?

15               *MR. LEO:* July 26th deposition.

16               *THE COURT:* Yes, which volume?

17               *MR. LEO:* The objections start with 113.

18               *THE COURT:* Which volume, volume 1?

19               *MR. LEO:* Yes.

20               *THE COURT:* What page?

21               *MR. LEO:* 113, line seven.

22               *THE COURT:* Okay.

23               *MR. LEO:* The objection is relevance. This is a  
24       question about a book he is writing after he has been fired.

25               *THE COURT:* "I understand. Are you writing a book?"

1           "I am in the process of setting up my home office. I  
2 have been -- I don't know if I mentioned this, I have been  
3 without office space, so that has been something of a  
4 hinderance. I am in the process of establishing a venue now."

5           So, you are concerned because it happened after he was  
6 terminated?

7           MR. LEO: Yes, this is in 2017.

8           THE COURT: Response.

9           MS. HUFF: Writing a book is relevant to what his  
10 state of mind was at the time, why he may or may not have  
11 wanted to turn in his forms, or disclose those activities to  
12 the university.

13          THE COURT: I will overrule. I do understand that is  
14 afterwards, that can be taken up in closing argument.

15          There are certain things that occurred on both sides,  
16 what the Defense did, changing policies, the Plaintiff wanted  
17 in and Defense didn't, and I allowed it in.

18          Now there are things Tracy has done post termination  
19 plaintiff doesn't want in, and Defense wants in. It can be put  
20 in proper context in argument. What else?

21          MR. LEO: Similar objection --

22          THE COURT: If it is the same type, it would be the  
23 same ruling.

24          MR. LEO: This is with respect to money he received  
25 afterwards.

1           *THE COURT:* I am going to overrule, that is more  
2 suitable for argument. It can remain in.

3           Anything else in this volume?

4           *MR. LEO:* I do not believe so.

5           *THE COURT:* Anything in volume 2 of the 7/26, and then  
6 there is 8/18.

7           *MR. LEO:* I apologize, I am working off of two  
8 different versions of this. I think the only objection that  
9 remains is page 30, line 23.

10          *THE COURT:* Page 30, line 23?

11          *MR. LEO:* Through 33.

12          *THE COURT:* "We are done with Exhibit 4. I represent  
13 to you that this is not an article you drafted, but it is an  
14 article that discusses you. My first question: Do you  
15 recognize this particular article on Jim Fetzer's blog?"

16          "Yes. It's been a while since I've read it."

17          "But do you recognize it?"

18          "I believe so."

19          Did you read this article around the time it was  
20 published in December, 2015? I am summarizing what is said.

21          "Well, I think this was another article that was  
22 republished but I think I likely read it when it was posted."

23          What is the objection?

24          *MR. LEO:* Relevance.

25          *THE COURT:* What is the response?

1           *MS. HUFF:* It is relevant to the time he has been on  
2 the blog and testified about communications he had with Mr.  
3 Fetzer and the blog and Nobody Died at Sandy Hook.

4           *THE COURT:* I will overrule the relevancy objection,  
5 and allow that in.

6           *MR. LEO:* Again, this is not his blog they are asking  
7 about, this is somebody else's blog.

8           *THE COURT:* I understand. Okay, I will overrule that.  
9 Does that take care of all of Tracy?

10          *MR. LEO:* I think there might be one more.

11          *THE COURT:* And the person in charge of showing the  
12 video, you are able to excerpt all of these things?

13          *MS. HUFF:* It was only one, and that is done.

14          *THE COURT:* After Tracy, you have Ball live?

15          *MR. BENZION:* Yes, your Honor.

16          *THE COURT:* Okay.

17          *MR. LEO:* Your Honor, there was one more objection.

18          *THE COURT:* What is the other objection?

19          *MR. LEO:* Page 72, line 25.

20          *THE COURT:* Starting with the answer?

21          *MR. LEO:* There is no question they are designating,  
22 and they have an answer about -- this is not relevant, 403,  
23 talking about the Pozners.

24          *THE COURT:* The question before that: Do you believe  
25 that statement, that the Pozners were profiting handsomely from

1 the fake death of their son?

2 Answer: I think we can profit greatly from a more in  
3 depth investigation of who the Pozners are.

4 MR. LEO: They are asking about his beliefs.

5 THE COURT: Just that?

6 MR. LEO: Yes.

7 THE COURT: 25 and one?

8 MR. LEO: I don't think his beliefs are relevant.

9 MS. HUFF: We believe the beliefs are relevant. The  
10 Pozners are relevant, the op ed piece.

11 THE COURT: I will sustain that objection, page 72,  
12 line 25, and page 73, line one comes out.

13 That is it?

14 MR. LEO: Yes, for Dr. Tracy.

15 THE COURT: We are good with Tracy and Jason Ball live  
16 and we can take a break. Those of you who are working on  
17 resolving the rest of Moats and Johnson, if you can work on  
18 that so that would be narrowed down.

19 MS. HUFF: On Professor Tracy we have a few, we were  
20 able to resolve some of the counter designations to the extent  
21 where we are offering a page of testimony and they designated  
22 five or six pages, we have an objection to that counter  
23 designation. I don't know whether we should go through all of  
24 the examples.

25 THE COURT: No, not at 9:25 when the jury is waiting.

1           Do your designations and they have their counter  
2           designations.

3           Unless there is something particular about it that is  
4           objectionable because it is based on the Court's past ruling if  
5           you are feeling like completeness is too complete, if that is  
6           all it is, five pages instead of one page, at this juncture,  
7           unless it is something prejudicial and something as a matter of  
8           evidence that shouldn't come in, highlight that. Maybe those  
9           working on these can do that while the depo is being paid.

10          *MR. FEICHT:* There are a few counter designations  
11          referencing the senate faculty meeting.

12          *THE COURT:* The senate faculty meeting, I have ruled  
13          on that, the door has not been opened. The fact that the  
14          meeting took place, nothing that went on in the meeting, I left  
15          all of that out, and I was very extensive in my ruling as to  
16          why.

17          Everyone should be on fair notice about that. There  
18          are no doors open, work that out.

19          (Thereupon, the jury returned to the courtroom).

20          *THE COURT:* Good morning, everyone. Last evening the  
21          Plaintiff rested, which means the Plaintiff has put in all of  
22          its evidence. Now it is the Defendant's turn to put on the  
23          Defendant's evidence, and I will turn to the Defense now and  
24          ask what your first piece of evidence is, what witness, or how  
25          you are going to proceed at this time.

1           MR. FEICHT: Defense calls James Tracy by videotape  
2 deposition.

3           THE COURT: Okay, what that means, ladies and  
4 gentlemen, we haven't had a deposition in court yet, that is a  
5 witness' sworn testimony that is taken before the trial.

6           During a deposition the witness is under oath and  
7 swears to tell the truth and the lawyers for each party may ask  
8 questions. A court reporter is present and records the  
9 questions and the answers.

10           The deposition of James Tracy was taken on various  
11 dates, May 2nd, July 26th, August 18, 2017. Those are the  
12 dates.

13           On those dates, what is about to be presented to you  
14 by video deposition testimony is entitled to the same  
15 consideration as live testimony, and you must judge it in the  
16 same way as if the witness was testifying in court.

17           As I understand it, the Defendant is going to present  
18 certain parts of Dr. Tracy's deposition from the various dates  
19 by video, then the Plaintiff is also going to designate certain  
20 portions and they are going to do it by reading.

21           Is that correct?

22           MR. BENZION: That is correct.

23           THE COURT: They will have two people reading it, one  
24 playing the role of the attorney and the other the role of Dr.  
25 Tracy, unless they have Dr. Tracy read the answers. I am not

1       sure. That is how the Plaintiff will have that done.

2               With that, the Defendant may proceed with your first  
3 witness, which is Dr. Tracy by video deposition.

4               (Thereupon, the video deposition designations were  
5 played.)

6               MR. CURLEY: One moment, your Honor. Do you want us  
7 to put the documents in after or should we pause as we go?

8               THE COURT: Are these unobjected to documents?

9               MR. LEO: No objection. No objection.

10              MR. CURLEY: Defendant's Exhibit 20.

11              THE COURT: All right. Defense 20 is admitted without  
12 objection.

13              (Whereupon Defense Exhibit 20 was marked for evidence.)

14              MR. CURLEY: Would you publish the front page? This  
15 is what Exhibit 20 looks like, it is a big document.

16              Thank you, your Honor.

17              THE COURT: Okay.

18              (Deposition continued.)

19              MR. CURLEY: Can you give us a minute to check, your  
20 Honor. I believe this is the same thing we just saw.

21              THE COURT: Okay.

22              (Pause.)

23              (Deposition continued.)

24              MR. FEICHT: Your Honor, that is the end of the video  
25 deposition. We do have a few designations from the May 15,



1 2017 deposition that was not videotaped. Mr. Curley will read  
2 the answers of Dr. Tracy.

3 *THE COURT:* This is within the same instructions I  
4 explained before, now there will be role playing, one will play  
5 the attorney and one Dr. Tracy.

6 Mr. Curley is playing Dr. Tracy, and this is from  
7 which deposition?

8 *MR. FEICHT:* The May 15, 2017 deposition.

9 *THE COURT:* Okay.

10 *MR. FEICHT:* May I proceed?

11 *THE COURT:* You may.

12 (Deposition designations read.)

13 *MR. FEICHT:* That concludes the portions for the  
14 deposition of Dr. Tracy.

15 *THE COURT:* Okay.

16 *MR. CURLEY:* Thank you, your Honor.

17 *THE COURT:* So, now, does the Plaintiff have any  
18 counter or cross designations that you want read?

19 *MR. LEO:* No, your Honor.

20 *THE COURT:* So, no cross designations. Okay.

21 Then the Plaintiff -- Defense may call your next  
22 witness.

23 *MR. FEICHT:* The Defendant's next witness is Jason  
24 Ball.

25 *THE COURT:* Okay.

1 JASON BALL, DEFENDANT'S WITNESS, SWORN

2 THE WITNESS: Jason Ball, J-A-S-O-N, B-A-L-L.

3 **DIRECT EXAMINATION**

4 MS. HUFF: Your Honor, may it please the Court.

5 THE COURT: Yes, you may proceed.

6 MS. HUFF: For the Madam Court Reporter, Sara Huff on  
7 behalf of Florida Atlantic University.

8 BY MS. HUFF:

9 Q. Good morning, Mr. Ball. Are you currently employed by FAU?

10 A. Yes.

11 Q. What is your job title?

12 A. Associate professor and chief information officer.

13 Q. What are some of your job duties?

14 A. I oversee all of the technology and institutional effect,  
15 which is the official reporting and data analyzing.

16 Q. I show you what is Defendant's 81.

17 Do you recognize this document?

18 A. Yes.

19 Q. And what is this document?

20 A. This is the acknowledgment when the faculty member in the  
21 FAIR system goes to agree to their assignment.

22 Q. And what is the FAIR system?

23 A. The FAIR system is a system used by the university where a  
24 chair establishes an assignment for a faculty member and also a  
25 report on the assignment of the given year.

1 Q. Was this always in the FAIR system?

2 A. No. It was added sometime in 2014.

3 Q. So, the check box was already in use in 2015?

4 A. That is correct.

5 Q. And do you know why the check box was added?

6 A. Not specifically.

7 Q. Did you decide to add the check box?

8 A. No.

9 Q. Who told you to add the check box?

10 A. It came from the Provost office.

11 Q. And what was this check box trying to accomplish?

12 A. It was to inform faculty of a university policy regarding  
13 outside employment, to make sure it was aware that the policy  
14 existed.

15 Q. When you say a policy surrounding outside employment, do  
16 you mean the conflict of interest/outside activities policy?

17 A. Yes.

18 Q. Are all faculty required to comply with that?

19 A. Yes, all employees are required to abide by university  
20 policy.

21 Q. So, the language in the check box is reminding the  
22 employees of an obligation they already have?

23 MR. LEO: Objection, leading.

24 THE COURT: Sustained.

25

1 BY MS. HUFF:

2 Q. The check box reminded the employees of an obligation they  
3 already have?

4 MR. LEO: Objection, calls for speculation.

5 THE COURT: Overruled. The witness can answer if you  
6 can.

7 BY MS. HUFF:

8 Q. Did you draft the language in the check box?

9 A. No.

10 Q. Did you create the check box in your office?

11 A. No. It was done by an outside party.

12 Q. So, what happens if a faculty member doesn't want to check  
13 the electronic box in FAIR?

14 MR. LEO: Objection, calls for speculation.

15 THE COURT: You can establish if the witness knows.

16 BY MS. HUFF:

17 Q. Do you deal with the FAIR system in your job?

18 A. Yes.

19 Q. Do you know what happens if the check box is not checked in  
20 the FAIR system?

21 A. It's part of the required assignment of the faculty, in the  
22 process, they are required to sign the annual assignment, it is  
23 required.

24 Q. Checking a box is a requirement of employment?

25 A. Yes.

1 Q. It is not optional?

2 A. No.

3 Q. What is the difference between electronically accepting and  
4 printing out the assignment?

5 A. There is no paper copy, it is required to proceed through  
6 the electronic system.

7 Q. Now, I am going to show you an exhibit that has just been  
8 marked for identification as Defendant's Exhibit 87, not yet  
9 admitted into evidence.

10 MR. LEO: Your Honor, I object to hearsay if it is  
11 being offered into evidence.

12 THE COURT: Are you seeking to have it into evidence  
13 or just showing the witness?

14 MS. HUFF: We are seeking to offer it into evidence,  
15 and I can lay the foundation.

16 THE COURT: You may do that without getting into the  
17 content of the document. This is Defendant's 87?

18 MS. HUFF: Yes.

19 THE COURT: You may proceed.

20 BY MS. HUFF:

21 Q. Mr. Ball, who is Nary Baran?

22 A. He is assistant in the office of technology.

23 Q. Is Mr. Baran in your chain of command?

24 A. Yes, he is.

25 Q. And to your knowledge, is Mr. Baran familiar with the FAIR

1 system?

2 A. Yes, he is.

3 Q. And familiar with the electronic box in the FAIR system?

4 A. Yes, in fact, he is responsible for the implementation of  
5 it.

6 Q. So, is it part of the regular conducted activity of your  
7 office to send and receive emails with Mr. Baran about the FAIR  
8 system?

9 A. Yes.

10 Q. Do you maintain these records in the regular course of your  
11 activities in the information technology office?

12 MR. LEO: Objection, leading.

13 THE COURT: Sustained.

14 BY MS. HUFF:

15 Q. Do you maintain emails like this in the regularly conducted  
16 course of your business in information technology?

17 A. Yes, we retain all emails for many years under the public  
18 records request.

19 MS. HUFF: I would like to admit this into evidence.

20 THE COURT: Any questioning the Plaintiff wants to do?

21 MR. BENZION: There is an objection that the event  
22 described in the email did not take place at the time of the  
23 submission, near or at the time of the submission of the email.

24 THE COURT: You can address that issue with the  
25 witness.

1           MR. BENZION: Mr. Ball --

2           THE COURT: No, counsel can who is at the stand,  
3 Defense counsel.

4           MR. BENZION: My apologies.

5           THE COURT: This is dealing with the issue of  
6 803(6)(a).

7 BY MS. HUFF:

8 Q. Was this record created at or near the time of the events  
9 discussed in the record?

10 A. It was after.

11           THE COURT: What was the answer, after?

12           THE WITNESS: Yes.

13           THE COURT: The email was drafted after the event?

14           THE WITNESS: Would you clarify, you mean at the time  
15 of the event or the time of the signature?

16 BY MS. HUFF:

17 Q. Where was Mr. Baran deriving the information from?

18 A. From the records in the FAIR system.

19           MR. BENZION: Objection, calls for speculation.

20           THE COURT: Establish if the witness knows where he  
21 was getting information.

22 BY MS. HUFF:

23 Q. Do you know where Nary Baran goes to get the information?

24 A. Yes, it is recorded in the FAIR system.

25 Q. And was this record created at or near the time that Mr.

1 Baran went into the FAIR system to look at the information?

2 A. The record was there before he went into the system to  
3 verify.

4 Q. The record being the email, when Mr. Baran communicated to  
5 you?

6 A. My correction, same time.

7 Q. Okay.

8 *THE COURT:* It is not clear to me what you just said.

9 *BY MS. HUFF:*

10 Q. Mr. Baran's email to you was created at or about the time  
11 he went into the FAIR system?

12 A. Yes, it was.

13 *THE COURT:* Any other objections?

14 *MR. BENZION:* Same objection, your Honor, still  
15 describing an event that took place that was not at or near the  
16 time of the email describing the event.

17 *THE COURT:* I think that is what the witness just  
18 testified to.

19 Do you have any further questions of the witness on  
20 that point? If so, you may ask the question now.

21 *MR. LEO:* Yes.

22 *BY MR. LEO:*

23 Q. Mr. Ball, the event described in the email occurred in  
24 July 8th?

25 A. Yes.



1 Q. And the email happened months later, November 9th?

2 A. Yes.

3 MR. LEO: We move to exclude this for failing to meet  
4 803(6)(a) at or near the time of the event.

5 THE COURT: Anything further?

6 MS. HUFF: Yes. The event was him going to the FAIR  
7 system to check, and that was done at the same time he sent the  
8 email according to Mr. Ball's testimony.

9 THE COURT: Okay, I am going to sustain the objection.

10 MS. HUFF: Okay.

11 THE COURT: So it can be marked for ID.

12 BY MS. HUFF:

13 Q. Mr. Ball, are you able to tell through the system which  
14 faculty members have checked the electronic box?

15 A. Yes.

16 Q. In 2015, did your office look into the FAIR system to see  
17 whether Professor Tracy previously checked the box?

18 A. Yes.

19 Q. Had he?

20 A. Yes.

21 Q. Do you remember when he checked the box?

22 A. In July.

23 Q. In July 2015?

24 A. Yes.

25 Q. And had the language of the check box changed over those

1     few months in 2015?

2     A.   No.

3     Q.   And you previously testified that the check box had already  
4     been in place for about a year at that point?

5     A.   Yes.

6     Q.   And do you know why a faculty member might be asked to  
7     check the box twice in the same academic year?

8     A.   Yes.  If the assignment changes, the system starts again,  
9     and part of the faculty signature is to acknowledge that in the  
10    check box.

11    Q.   Thank you.

12           Mr. Ball, now I would like to show you a document  
13    previously admitted into evidence, Plaintiff's 39.

14           Mr. Ball --

15           MR. LEO:  I object to the extent this is something  
16    that --

17           MS. HUFF:  Plaintiff's 39?

18           MR. LEO:  I object to the extent that she is putting a  
19    document in front of the witness that he is not involved in.

20           THE COURT:  Well, the exhibit is in evidence, correct?

21           MS. HUFF:  Yes, your Honor.

22           THE COURT:  So, we will see what he has knowledge of  
23    or doesn't.  I will allow you to ask the question first and  
24    let's see what the objection is.

1 BY MS. HUFF:

2 Q. Mr. Ball, are you familiar with electronically stored  
3 information, or ESI?

4 A. Yes.

5 Q. I want you to look at the email -- can we pull it up? This  
6 is the date right here. (Indicating.)

7 So, I assume -- I will ask you, 16:23:50, is that the time  
8 the email was sent?

9 A. Yes.

10 MR. LEO: Objection, calls for speculation.

11 THE COURT: Overruled. He said he was familiar with  
12 the system.

13 THE WITNESS: Yes.

14 BY MS. HUFF:

15 Q. Thank you. 16:23 would translate to 4:23 in the afternoon  
16 going on the 12 hour clock?

17 A. I would -- yes, but the minus five would suggest this is  
18 UMT or GMT time which means it would probably be 11:23.

19 Q. So my next question, can you say how that changes the time?

20 A. It is the change from Greenwich Mean Time.

21 Q. So, this was actually sent five hours earlier?

22 MR. LEO: Objection, leading.

23 THE COURT: Sustained.

24 BY MS. HUFF:

25 Q. Based on this time stamp, what time was it sent?

1 A. It looks like 11:23 to me.

2 MR. LEO: Objection, move to strike, speculating, lack  
3 of personal acknowledge.

4 MS. HUFF: We established his familiarity with the  
5 ESI.

6 THE COURT: You can take that up on the  
7 cross-examination. That is a question to the witness as to his  
8 understanding how the system works, I will let you go into  
9 that. Overruled.

10 BY MS. HUFF:

11 Q. That would be 11:23 in the morning?

12 A. Yes.

13 MS. HUFF: Thank you, that is all I have.

14 THE COURT: Any cross-examination?

15 MR. LEO: Briefly.

16 THE COURT: Okay, cross-examination.

17 **CROSS-EXAMINATION**

18 BY MR. LEO:

19 Q. A moment ago you testified that you believed that the check  
20 box was added around August 2014; is that right?

21 A. That is correct.

22 Q. You don't know for certain whether it was?

23 A. Yes, I do. It was added in August.

24 Q. You know for certain?

25 A. Yes.

1 Q. With respect to the system, that change wouldn't have been  
2 seen by Professor Tracy or the faculty until 2015, right?

3 A. Unless an assignment had changed, they wouldn't have seen  
4 it until the next assignment year.

5 Q. It is an annual assignment?

6 A. If the assignment changed, it could be seen in the middle  
7 of the year.

8 Q. No faculty members checked the box, including Dr. Tracy, in  
9 2014, right?

10 A. I would have to check the records, that could actually  
11 happen.

12 Q. You have no knowledge or haven't seen any records to  
13 suggest that Professor Tracy checked the box before 2014, do  
14 you?

15 A. No.

16 Q. With respect to the time system brought up by opposing  
17 counsel, is it your testimony that the time stamps are five  
18 hours off for all of the emails?

19 A. No. When you see that minus five, that suggests that is a  
20 change for Greenwich time.

21 Q. That is not necessarily the case, that doesn't necessarily  
22 mean it is minus five hours?

23 A. That is my interpretation.

24 Q. It could be Eastern Standard Time despite the fact that you  
25 say it could be different?

1 A. My interpretation, that is an adjustment for GMT.

2 Q. It could be Eastern Standard, right?

3 MS. HUFF: Objection, asked and answered.

4 THE COURT: Sustained.

5 BY MR. LEO:

6 Q. There is no -- would you pull that back up, that email, can  
7 you put it up.

8 This doesn't say Mountain Time, does it?

9 A. No.

10 Q. It doesn't say anything about what time zone this is,  
11 right?

12 A. I would say the minus five suggests that. Yes.

13 Q. Suggests it, but doesn't say Mountain Time, right?

14 MS. HUFF: Your Honor, this is argumentative.

15 THE COURT: I will allow that. Overruled.

16 BY MR. LEO:

17 Q. It doesn't say Mountain Time right here?

18 A. No.

19 MR. LEO: No further questions.

20 THE COURT: Anything on redirect?

21 MS. HUFF: No, your Honor.

22 THE COURT: Thank you very much, you may step down.

23 Ladies and gentlemen, we will take our mid-morning  
24 break at this point. We will be in recess for 15 minutes. It  
25 is 20 minutes to 11:00, so a little before 11:00 o'clock, with

1 the same instruction, not to discuss the case, not to do any  
2 research about the case, not to have any contact with anyone  
3 associated with the case.

4 We will see you back in 15 minutes. Thank you.

5 *(Thereupon, the jury leaves the courtroom.)*

6 THE COURT: All right. Let's address the Moats  
7 deposition which I understand is what Defense was anticipating  
8 to put on next.

9 I tried to ascertain and the video was consistent with  
10 what Plaintiff was bringing to the Court's attention. There  
11 appears to be one overarching objection in the Moats  
12 deposition, and that is the Plaintiff saying the Defendant  
13 waived all form objections, and the Defendant is saying they  
14 have not.

15 The dispute appears to be Moats, previously a  
16 Defendant, was represented by his own counsel at his  
17 deposition, his own counsel did not raise any objections, and  
18 now the Defendant wants to raise objections.

19 The rule does not have, as the best the Court can see,  
20 any leeway in this regard. The reason for requiring form  
21 objections, which is what is at issue here at the deposition,  
22 is so the questioner has an opportunity to rephrase. The  
23 Plaintiff did not get the opportunity to rephrase, and they now  
24 have closed their case at trial, so it would appear to the  
25 Court that there would be prejudice.

1           The Court does acknowledge that Mr. Moats was  
2 represented by separate counsel and was a party at the time of  
3 his deposition, but Defense -- FAU has not proffered that it  
4 was somehow prevented by law from raising appropriate  
5 objections. Defense said counsel was there at the deposition,  
6 and pursuant to Federal Rule of Civil Procedure 32(d)(3)(B)  
7 little i, form objections not brought up at the deposition are  
8 waived. Those objections must be waived at the deposition so  
9 the questioner has the opportunity to rephrase the question.  
10 The Plaintiff was never afforded that opportunity, therefore  
11 any objection made to form by the Defendant is overruled.

12           Anything else in Moats that you haven't worked out?

13           MR. FEICHT: There are objections by Plaintiff to  
14 particular designations by the Defendant, as well as objections  
15 by the Defendant to the Plaintiff's counter designations.

16           I understand your ruling, I won't address any form  
17 objections. There is hearsay, lack of personal knowledge.

18           THE COURT: You tried to work those out?

19           MR. FEICHT: Yes.

20           THE COURT: How extensive are they? Are they so  
21 extensive you should call a live witness next so that could be  
22 taken up maybe over the lunch hour?

23           MR. FEICHT: Robert Zoeller is live, he is currently  
24 administering an exam. He said he would try to get to the  
25 courthouse at 1:30. The exams start at ten o'clock or



1       thereabouts.

2               *THE COURT:* Well, I think you need to be ready to go  
3 forward with Moats. We have 15 minutes. You can bring in what  
4 issues you can get covered. Let's go, let's go. Where is the  
5 deposition, is it a Defendant deposition?

6               *MR. FEICHT:* It is Defendant's deposition designation  
7 for Michael Moats, the date was April 18, 2017.

8               *THE COURT:* April.

9               *MR. FEICHT:* 18.

10              *THE COURT:* Volume 1?

11              *MR. FEICHT:* Yes, page 22, lines 14 to 25. Plaintiff  
12 has no objection, but the counter designation is for testimony  
13 on 182 through 185 and 273 --

14              *THE COURT:* You are going to have to summarize, what  
15 is the issue?

16              What page am I supposed to be going to, page 182?

17              *MR. FEICHT:* Well, the objection is that the counter  
18 designation is not a completeness of designation, they are  
19 trying to add other designations. So, it would require the  
20 Court to first look at what is designated on page 22, lines 14  
21 through 23, line ten, and then I will show the Court the  
22 designation several hundred pages later.

23              *THE COURT:* Do I have a list of the ones you narrowed  
24 down? Is that what you handed to the Court this morning?

25              *MR. LEO:* No, your Honor, Defense filed actually more

1 designations last night, so we haven't had a chance to file  
2 anything, but we did try to work through the objections.

3 Now we are jumping to counter designations.

4 THE COURT: Let's stick to what objections there are  
5 to the Defendant's.

6 MR. LEO: Start with --

7 THE COURT: We have 15 minutes.

8 MR. LEO: Page 85, line 23. This is a new designation  
9 that was added last night.

10 THE COURT: Page 85, line 23.

11 MR. LEO: Through 86, seven.

12 THE COURT: Who was asking the question?

13 MR. LEO: I was.

14 THE COURT: This is the Plaintiff's question?

15 MR. LEO: Yes.

16 THE COURT: This is Moats' deposition by the  
17 Plaintiff?

18 MR. LEO: Yes.

19 THE COURT: Why is what you and Zoeller say different  
20 from what the other four faculty say about this? Because they  
21 don't know what they are talking about.

22 MR. LEO: Yes, your Honor.

23 THE COURT: That is what you are objecting to?

24 MR. LEO: He was a party in the case, sitting in other  
25 depositions before his deposition. He is commenting on these

1 other witnesses' statements during the depositions. He lacked  
2 personal knowledge of what they said with respect to -- it is  
3 not entirely clear what he is even saying that they don't know  
4 what they are talking about.

5 *THE COURT:* Response.

6 *MR. FEICHT:* The response is that it was Mr. Leo's  
7 question and he asked the witness to comment as the -- what is  
8 being asked is why is what they say different than what the  
9 other faculty members say. And Mr. Moats is saying that these  
10 other professors don't have as much knowledge as he does  
11 regarding union activities, that is the point of the testimony.

12 *MR. LEO:* That is a mischaracterization, this is  
13 regarding what they say about the entire case.

14 *THE COURT:* All right. Are there other lines that can  
15 be brought in to put it into context?

16 *MR. LEO:* No, they are taking it out of context, they  
17 are trying to make it seem like -- they are trying to offer  
18 this witness' opinion about the credibility of other witnesses  
19 who testified in this case, out of context.

20 *THE COURT:* All right. I am going to sustain that  
21 objection.

22 Next one.

23 *MR. LEO:* Page 88, 16, starts with okay.

24 *THE COURT:* What is being objected to?

25 *MR. LEO:* Again, out of context --

1           *THE COURT:* What are the lines being objected to?

2           *MR. LEO:* The entire designation, hearsay, lack of  
3 knowledge. 88, 16 through 91, six. Hearsay, lack of personal  
4 knowledge, facts not in evidence.

5           *THE COURT:* Response.

6           *MR. FEICHT:* He does have personal knowledge of this,  
7 this is Mr. Moats who was involved as the union service unit  
8 director and he is explaining what the reaction was to the  
9 discipline to Dr. Tracy and the notice and advice provided to  
10 Dr. Tracy.

11           *THE COURT:* Why is the reaction to the discipline of  
12 Dr. Tracy relevant, the reaction?

13           *MR. FEICHT:* The union reacted to the discipline on  
14 behalf of Dr. Tracy and provided him advice.

15           *THE COURT:* So, their actions vis-a-vis Dr. Tracy  
16 would be relevant. But this is about their actions.

17           *MR. FEICHT:* Specifically page 88, line 20: They  
18 fired him because they determined he did not report the  
19 activity once he, Dr. Tracy, by his own admission admitted that  
20 the activity rose to the level of a reportable activity. When  
21 we had our first conversation whether or not he needed to  
22 report his activity, this is an admission by Dr. Tracy to  
23 Michael Moats that he knew his activity was reportable.

24           *MR. LEO:* Response, your Honor.

25           *THE COURT:* Well, can you start with line 20 where he

1 says, "they fired him because they determined that he did not  
2 report the activity once he, by his own admission, admitted  
3 that the activity rose to the level of reportable activity by  
4 his own admission to me.

5 "When?

6 "When we had our first conversation about whether or  
7 not he needed to report this activity after --

8 "In 2013?

9 "No. No. And that is why I said in 2013 his  
10 characterization of the activity was clearly to me that it was  
11 not -- did not rise to the level of reportable activity and I  
12 told him based on that you don't need to report it.

13 "Is that what you told him?

14 "That's what I told him."

15 Where would you like to go through?

16 *MR. FEICHT:* We would like to read through that page.

17 *MR. LEO:* Hearsay, I believe I told him, lacks  
18 personal knowledge.

19 *MR. FEICHT:* He has personal knowledge about the  
20 conversation of the Plaintiff. It is not offered for the truth  
21 of the matter asserted, it was because the Plaintiff was on  
22 notice that the activities were reportable. He is claiming  
23 confusion and he had notice from the union person representing  
24 him who told him to report it.

25 *THE COURT:* I will overrule the objection. If you

1 want a limiting instruction at that period of time, let me know  
2 and I can give a limiting instruction that is not being offered  
3 for the truth of the matter.

4 MR. LEO: Yes, we want that.

5 THE COURT: Page 89, line 17. Do you want the  
6 limiting instruction?

7 MR. LEO: Yes, your Honor.

8 THE COURT: Not for the truth.

9 MR. FEICHT: We'll pause it right there.

10 THE COURT: Remind the Court about the limiting  
11 instruction.

12 We just have a minute or two. Pick or choose what the  
13 remaining ones are, otherwise you have to resolve it.

14 Is that it for the Plaintiff's objections?

15 MR. LEO: We have about four, I believe, or five more.  
16 Can we go to the next one, 130?

17 THE COURT: Page 130.

18 MR. LEO: Six through 24.

19 THE COURT: "Was Professor Tracy's rights waived in  
20 October of 2015 when no grievance was filed?

21 "No.

22 "Was Professor Tracy's rights waived in November of  
23 2015 when no grievance was filed?

24 "No."

25 What is the problem with this?

1           MR. LEO: Lack of personal knowledge, facts not in  
2 evidence.

3           THE COURT: Response.

4           MR. FEICHT: This is the service director of the  
5 union, he is advising him, and when the rest of the deposition  
6 is read, he establishes, yes, he has experiences with union  
7 activities, including filing of grievances and applicable  
8 deadlines.

9           He was personally involved telling Dr. Tracy that he  
10 was not filing a grievance on his behalf.

11          THE COURT: I will overrule this. This is subject to  
12 the testimony of Dr. Tracy about grievance and lack thereof by  
13 the union to defend him or file an agreement. It certainly is  
14 at issue, and he does seem to have personal knowledge based on  
15 his role.

16          What was Michael Moats' position at that time?

17          MR. FEICHT: Service unit director, he is a -- he is  
18 not a faculty member at FAU, he is an official for the UFF FAU  
19 union. He helps a number of different colleges within the  
20 state on behalf of those unions for the faculty members.

21          THE COURT: That is overruled.

22          MR. LEO: 214, your Honor, line two.

23          THE COURT: This is a different volume?

24          MR. LEO: Yes, your Honor.

25          THE COURT: 214, did you say?

1           MR. LEO: Yes, 214. Given your Honor's ruling, I  
2 think this would be another point where we need an instruction  
3 if it is admissible. The witness testifying what he says to  
4 Professor Tracy is hearsay.

5           MR. FEICHT: No objection to pausing right there.

6           THE COURT: Page 214?

7           MR. LEO: Yes.

8           THE COURT: I will give a limiting instruction that  
9 the -- the next testimony that the jury will hear will not  
10 be -- is not offered for the truth of the matter.

11           What you do is tell me page and line and then I will  
12 instruct the jury at that point so they know it is just that  
13 portion that is not for the truth of the matter.

14           What is the next one?

15           MR. LEO: 232, 17 through 233, six. The objection is  
16 lack of personal knowledge, hearsay, and facts not in evidence.  
17 The witness is recounting a conversation he had with FAU's  
18 lawyer.

19           THE COURT: What line?

20           MR. LEO: Line 17 -- I'm sorry, starts at 17  
21 through --

22           THE COURT: Page 232, line 17?

23           MR. LEO: Through 233, six.

24           The witness said he did not read the book.

25           THE COURT: "As we discussed earlier -- as we



1 discussed earlier, the book you haven't read --

2 "That is immaterial.

3 "Well, if you don't even look at the book to see if it  
4 says by James Tracy, wouldn't that be material to your  
5 understanding of whether he actually wrote the book?

6 "Jim Tracy told me he co-authored the book.

7 "I don't care what Jim Tracy told you.

8 "Well, I do. Okay?

9 "I'm asking you about what you did to investigate  
10 whether he actually wrote the book other than talking to him.  
11 Did you look at the book?

12 "What the book says does not refute what he tells me  
13 himself.

14 "Do you know what hearsay is?"

15 *MR. FEICHT:* We have not designated past six.

16 *MR. LEO:* I move to strike my comments.

17 *THE COURT:* All right. You can take that out. Take  
18 line 25 out and line one, I do, okay. Take out line 25 on 232  
19 and line one on 233.

20 *MR. LEO:* There is nothing else objectionable there.

21 *THE COURT:* All right. What else?

22 *MR. LEO:* 236, line 11.

23 *THE COURT:* "Professor Tracy had not received a dime  
24 from his contribution, if any, to that book, would that be a  
25 reportable outside activity?

1           "The fact that he's got it up on Amazon offering it  
2 for the sale makes it --

3           "Who is he? Who is he?

4           "Jim Tracy told me he had it."

5           MR. LEO: This is lack of personal knowledge, again,  
6 this is an adverse witness, he is lying about Tracy writing a  
7 book. And with respect to these witnesses being adverse, our  
8 biggest concern is that this will create a trial in a trial,  
9 former parties who entered into a settlement agreement.

10          THE COURT: All right. I am not worried about a trial  
11 within a trial, I think we have had a clean trial so far. I am  
12 trying to understand the evidentiary basis for objections.

13          It appears to be a statement Jim Tracy told him, a  
14 statement of a party opponent. What else is objectionable  
15 about it?

16          MR. LEO: He is stating it was being offered on  
17 Amazon. He has no personal knowledge of that.

18          THE COURT: He said Jim Tracy has it, the comment was  
19 we self published and we have it online at Amazon.

20          MR. LEO: If this is going to come in, we would like  
21 an instruction as to the adverse witnesses, and they were  
22 adverse witnesses.

23          THE COURT: I don't think that is a standard  
24 instruction. If you can find me something, I am not familiar  
25 with that instruction.

1           MR. LEO: We'll look, your Honor.

2           THE COURT: Okay, is that it?

3           MR. LEO: Yes, your Honor.

4           THE COURT: Okay. What is the issue -- and then you  
5 can work out counter designations.

6           MR. FEICHT: I will try to see what they intended. We  
7 tried to work out the counter designations at break and before  
8 we began. They didn't even read any.

9           THE COURT: We are going to take our break. I will  
10 give you a brief break here. Make those adjustments with the  
11 Court's ruling.

12           Have you worked out Johnson? Can I get direction on  
13 are you closer rather than farther apart on Johnson?

14           MR. FEICHT: We have made progress, Dr Tracy's  
15 designations, we worked out additional ones, we have worked out  
16 two-thirds of the deposition.

17           THE COURT: Can you highlight in one second or less,  
18 is there one overarching Johnson problem that I should be  
19 researching so we are ready for Johnson? Rather than line by  
20 line, is there a fundamental problem with Johnson so I can give  
21 you a ruling that would help you?

22           MR. BENZION: A few of the objections are based on  
23 some exclusions that are made with respect to evidence, 408  
24 issues, and free speech.

25           THE COURT: If I made rulings, you can clean that up.

1 Anything I haven't made a ruling on that looms large?

2 MR. FEICHT: One thing we have in the counter  
3 designations is, they ask the witness to offer a speculation or  
4 personal belief about the reasons for Jim Tracy's termination.  
5 Obviously, this is Dr. Tracy's former lawyer, he is echoing the  
6 allegations in the complaint saying it is pretextual and other  
7 things and he is shown during the deposition a complete version  
8 of Plaintiff's Exhibit 2, which is Dr. Coltman's notes, and  
9 asked to speculate what his opinions are to the validity of the  
10 claims based on those notes.

11 There is a lack of foundation, and a lot of that  
12 exhibit was explained by Dr. Coltman.

13 THE COURT: That is the big part of it?

14 MR. FEICHT: Yes.

15 THE COURT: What is the Plaintiff's position why  
16 Johnson shouldn't be able to testify what he thinks the merits,  
17 or lack thereof, of Dr. Tracy -- why would we have anyone come  
18 in and say I think this is a strong case, this is not a strong  
19 case for these reasons? What would give him the basis to do  
20 that?

21 MR. BENZION: There is testimony designated of Johnson  
22 by the Defendant that they want his opinion that he was  
23 violating the rules, while at the same time they don't want his  
24 opinion that he had a free speech claim, or things along those  
25 lines. They are looking for an opinion favorable to them and

1       then not favorable to them.

2               *THE COURT:* Is the response, they opened the door?

3               *MR. BENZION:* Yes.

4               *THE COURT:* What volume and page block -- tell me what  
5       general area in Johnson you are talking about.

6               *MR. BENZION:* Mr. Feicht, you were speaking about a  
7       counter designation?

8               *THE COURT:* Are they withdrawn?

9               *MR. BENZION:* We have not gone through the counter  
10      designations.

11              *THE COURT:* Keep working on it. Can you point me to  
12      generally where this is so we can be reading it in the  
13      meanwhile, specifically?

14              *MR. BENZION:* I can tell your Honor there are  
15      relevancy objections.

16              *THE COURT:* No. Page numbers. Just the general area  
17      of what you just told me, is it generally in a certain area of  
18      the deposition?

19              *MR. BENZION:* We had not gotten to the counter  
20      designations that Mr. Feicht just discussed.

21              *THE COURT:* Okay, we will go on break. Thanks, a few  
22      minutes and then we will be back.

23              *(Thereupon, a short recess was taken.)*

24              *THE COURT:* Okay, we will take the time to go over the  
25      Johnson deposition so everyone has been heard on that.

1           For right now, I know you are going to be calling  
2       Zoeller after Moats, right?

3           *MR. FEICHT:* That is correct, your Honor.

4           *THE COURT:* Is there anything else on Moats that has  
5       not been addressed?

6           *MR. FEICHT:* Everything has been addressed as far as  
7       Plaintiff's objections to our direct designations. There are  
8       counter designations to see which one of those they need to  
9       read.

10          *THE COURT:* We will take a break so I make sure  
11       everyone has been heard, and nobody feels there is a  
12       designation that has not been ruled on.

13          You will let me know when to give the limiting  
14       instructions on pages 89 and 214 for Moats' designations,  
15       somebody from Defense side will let me know that.

16          *MR. FEICHT:* Yes, we have a copy of the transcript and  
17       we'll pause it at two points.

18          This runs a little over 30 minutes so we will have the  
19       opportunity at lunch to work on the Plaintiff's counter  
20       designations as well as Johnson further issues.

21          *THE COURT:* Okay. What are the dates of Moats so I  
22       can let them know?

23          *MR. FEICHT:* One date, April 18, 2017.

24          *THE COURT:* Thank you. I do know everyone is working,  
25       don't take my comments as not recognizing everyone is working.

1 Do we have all of our jurors ready?

2 We don't have all of our parties here or lawyers here.  
3 We need the Plaintiff.

4 MR. BENZION: Yes.

5 THE COURT: And the team.

6 MR. BENZION: Yes, I will grab them, your Honor.

7 THE COURT: Okay.

8 (Thereupon, the jury returned to the courtroom).

9 THE COURT: All right. Welcome back, you may be  
10 seated.

11 As previously with the deposition of James Tracy, we  
12 now have another deposition. As I explained earlier, a  
13 deposition is sworn testimony taken before trial. During the  
14 deposition the witness is under oath and swears to tell the  
15 truth, and the lawyers for each party may ask questions. A  
16 court reporter is present and records the questions and  
17 answers.

18 The deposition of Michael Moats taken on April 18,  
19 2017, is going to be presented to you both by video deposition,  
20 that is by a video, and maybe some of it will be read.  
21 Deposition testimony is entitled to the same consideration as  
22 live testimony, and you may judge it in the same way as if the  
23 witness were testifying in court.

24 There may be portions of the deposition where the  
25 attorneys may pause and I will instruct you that a certain

1 portion of what Mr. Moats is testifying to is not coming in for  
2 the truth of the matter.

3 As you know, sometimes I have given that limiting  
4 instruction with respect to other testimony, and so, there are  
5 a couple of instances where I believe I will be giving you that  
6 instruction as relates to Mr. Moats' deposition testimony.

7 So, with that, you may proceed.

8 MR. FEICHT: Thank you, your Honor. We will be  
9 playing the deposition of Michael Moats.

10 (Thereupon, the deposition designations were played.)

11 THE COURT: Okay, is this -- let me know through what  
12 line so I can instruct the jurors. From what line to what  
13 line?

14 MR. FEICHT: We don't have a specific line number for  
15 that -- the answer after this question.

16 THE COURT: What appears on everyone's screen, line  
17 14, the next answer?

18 MR. FEICHT: Correct, the answer will be on line 17.

19 THE COURT: The answer that appears on line 17, ladies  
20 and gentlemen, this is not coming in for the truth of the  
21 matter. Okay.

22 (Video continued.)

23 THE COURT: Is this the next part?

24 MR. FEICHT: Yes.

25 THE COURT: So, the answer to the next question,



1 ladies and gentlemen, similarly has the same instruction, it is  
2 not being offered for the truth of the matter of what this  
3 witness is saying.

4 (Video continued.)

5 MR. FEICHT: That concludes the deposition testimony  
6 of Michael Moats.

7 THE COURT: Does Plaintiff know at this point of any  
8 cross designations or that is something you want to --

9 MR. LEO: Co-counsel are doing that now. We could  
10 have a lunch break now and then determine that.

11 THE COURT: Okay, lunch break it is.

12 At this point we will take our lunch break and we will  
13 be in recess -- let me see. What is enough time for everyone  
14 to get everything done?

15 MR. LEO: We will work within your time constraints.

16 THE COURT: It is going on twelve o'clock. Why don't  
17 we say, so we can try to anticipate other issues, too, why  
18 don't we say 1:30. That is an hour and a half, and that is  
19 because, ladies and gentlemen, maybe we could take up legal  
20 matters while you are at lunch break.

21 We will be back at 1:30, with a reminder do not  
22 discuss the case among yourselves, do not view any media about  
23 the case, do not have any discussion with anyone connected with  
24 the case. Have a nice lunch, and we will see you back at 1:30.

25 (Thereupon, the jury leaves the courtroom.)

1           *THE COURT:* Does it make sense -- why don't we come  
2 back at 1:00 and clean up anything we have to with respect to  
3 the cross designations of Michael Moats.

4           I'm assuming we don't anticipate any issues with  
5 Zoeller. If you do, try to bring those to my attention at that  
6 time as well. I know he is live.

7           If we could clean up anything in advance with respect  
8 to any exhibits, let's try to do that, and let's, by all means,  
9 be prepared to go over everything that is problematic from each  
10 side with respect to Johnson. I will be reviewing Johnson more  
11 carefully over the lunch break, but I would encourage you to  
12 continue to whittle down only those objections you cannot  
13 resolve and we will take those up as well.

14           It would seem that -- how long is Zoeller, Johnson and  
15 Campbell?

16           *MR. FEICHT:* Dr. Zoeller is approximately under an  
17 hour for direct.

18           *THE COURT:* Okay.

19           *MR. FEICHT:* I don't know the approximate run time of  
20 the Johnson deposition. That is an hour and a half, an hour  
21 and 17. So, given -- depending on the amount of Michael Moats  
22 cross designations, Dr. Zoeller, I am guessing he will take  
23 approximately one and a half hours it looks like, including  
24 direct, cross and redirect, and then Mr. Johnson's deposition,  
25 another hour and a half, and then that would likely bring us to

1 the end of the day.

2 Dr. Campbell is the expert and she is traveling from  
3 Jacksonville currently and will be here ready to go first thing  
4 in the morning.

5 *THE COURT:* How long is she?

6 *MR. FEICHT:* About an hour on direct.

7 *THE COURT:* The goal should be by the end of today, if  
8 it means before five o'clock, if we are finished with Zoeller  
9 and Johnson, and any cross designations of Moats, we'll end the  
10 day for the jury and then I want to take up the jury  
11 instructions. I hope you had a chance to review them, what I  
12 gave you yesterday, the red line version, Court Exhibit 1, and  
13 the clean version of Court Exhibit 1, which is Court Exhibit 2.

14 We will take that up, we will take up the Defense  
15 motion so all of that is cleaned up, and we go into Friday with  
16 just Campbell, and it would seem to me if anything we didn't  
17 finish tonight on the jury instructions, we would finish up.

18 I only have until twelve o'clock tomorrow. Whatever  
19 free time we have we will do more clean up, and looking at  
20 Monday, it would seem unless there is any rebuttal case -- but  
21 I need to know that because that would go on tomorrow.

22 Is Plaintiff anticipating a rebuttal case?

23 *MR. LEO:* We may call the Plaintiff to rebut the  
24 testimony today, but we have not made a decision.

25 *THE COURT:* That would be tomorrow, and Monday we

1 would be ready to instruct the jury and closing arguments and  
2 have them do deliberations. Does that sound right?

3 MR. FEICHT: Yes.

4 THE COURT: We will see everybody back at one o'clock.  
5 Thanks.

6 *(Thereupon, a luncheon recess was taken.)*

7 THE COURT: Is everybody here?

8 MR. LEO: Yes, your Honor, for the Plaintiff.

9 THE COURT: Let's first finish up -- everybody for the  
10 Defense here?

11 MR. FEICHT: Yes.

12 THE COURT: For the record, say yes so it is clear.

13 Let's first talk about Moats.

14 MR. LEO: I believe there may be an objection to one.

15 MR. MEDGEBOW: A few, your Honor, we have only  
16 designated --

17 THE COURT: Point me to which volume.

18 MR. MEDGEBOW: I will let the Defendant tell us what  
19 you objected to.

20 MR. FEICHT: Volume 2, volume 2, page 182.

21 THE COURT: What line?

22 MR. FEICHT: Lines nine to 12, no objection.

23 THE COURT: "Regarding academic freedom, you gave  
24 Professor Tracy pretty good advice about what you said, right?  
25 Yes." That is not objected to.

1           MR. FEICHT: Line 13 through page 183, line four. We  
2 have a personal knowledge objection. The witness repeatedly  
3 says, I couldn't tell you, I don't remember, I don't know.

4           THE COURT: Let me look at that. Okay.

5           MR. MEDGEBOW: Response?

6           THE COURT: Yes.

7           MR. MEDGEBOW: They put the credibility at issue. In  
8 addition, personal knowledge is a type of objection that is not  
9 contemplated under Rule 32(d)(3), which states if you don't  
10 make an objection at the time, it is waived. Form objections  
11 include personal knowledge as cited in our brief.

12          THE COURT: Okay, I am going to overrule the objection  
13 because he is not testifying about something he didn't know.  
14 He says, I don't know or I don't remember.

15          So, the jury can weigh, you know, the strength of that  
16 testimony, but I don't view that as a personal knowledge  
17 objection where somebody is actually giving testimony about  
18 something he doesn't have the personal knowledge of, he is  
19 saying I don't know, I don't remember.

20          If the Plaintiff wants it in, no legal basis to keep  
21 it out.

22          MR. FEICHT: Next one, 185. Plaintiff would only like  
23 to read lines three to six, and the question actually begins  
24 and -- and is part of a discussion of the email that actually  
25 begins on page 184.

1           *THE COURT:* You just want three through six?

2           *MR. FEICHT:* The Plaintiff wants three to six.

3           *THE COURT:* And that is what led to the agreement --  
4       yes, yes.

5           *MR. FEICHT:* That is a completeness objection, we  
6       would -- we have no objection to those lines so long as we  
7       start at 184, line seven where there is a discussion about what  
8       led to the agreement in 2013. 184, line seven through 185,  
9       line two.

10          *THE COURT:* That would make sense.

11          *MR. MEDGEBOW:* If I may respond briefly?

12          *THE COURT:* And picks up, that is what led to the  
13       agreement.

14          *MR. MEDGEBOW:* That's where we left off 184, 6, the  
15       other things are soccer team examples and whatnot.

16          *THE COURT:* He already said that.

17          *MR. MEDGEBOW:* Once again, in line with the Court's  
18       previous ruling, not objected to, incomplete is not one --

19          *THE COURT:* What are you suggesting should be read  
20       before that? What has been read already, if anything, before  
21       that?

22          *MR. MEDGEBOW:* Go from 182, nine, to 184, six.

23          *THE COURT:* Let me see.

24                So, 184, 6 ends with, "when you say in your email the  
25       university has no right to discipline you for the blog, that is

1     what you are referring to, right?" And he says yes, and skips  
2     right down to number three, line three, page 185, "and that is  
3     what led to the grievance that was filed by Doug Broadfield on  
4     behalf of Professor Tracy in 2013."

5             *MR. MEDGEBOW:* Yes, your Honor, that is what it  
6     connects to, but referring specifically to that email.

7             *MR. FEICHT:* That email, the sentence prior to that  
8     says -- they are trying to take parts of the email out of  
9     context. They are asking the witness, starting on 183, about  
10    what they marked as PM 11, and they are going through this and  
11    they stop, skip these two sentences --

12            *THE COURT:* Which two sentences?

13            *MR. FEICHT:* Skipping 184, seven, the question there,  
14    they are asking about that same exhibit, and the witness is  
15    explaining his previous answer. And the question on 184, 17,  
16    explains, the sentence prior to that says, blah, blah, blah,  
17    that is based on the information he gave me.

18            It is required for completeness purposes.

19            *THE COURT:* I will sustain the objection and have all  
20    of that read for completeness purposes.

21            Do you still want it in?

22            *MR. LEO:* No, we are not going to read 185 through  
23    186. Most of the designations that opposing counsel used were  
24    taken out of context and cut out a bunch of things. This is  
25    consistent with the way Defense presented his testimony.

1           *THE COURT:* But you can tell me that -- at any time  
2 you could have told me that other things should have been read  
3 for completeness, and I would listen to you. You can make the  
4 same arguments.

5           *MR. LEO:* It is easier if we don't read the last part.  
6 We do not want to read about this man ranting about God knows  
7 what.

8           *THE COURT:* It has been withdrawn, I don't have to  
9 rule because the Plaintiff has withdrawn the counter  
10 designations.

11           *MR. FEICHT:* Can we know what they are reading on 183  
12 and 184? I wanted to pick up on 184.

13           *THE COURT:* What is being read?

14           *MR. MEDGEBOW:* 182, line nine, through 184, 6.

15           *MR. FEICHT:* We have the same completeness argument.  
16 We would like to pick up on 184, 7.

17           *THE COURT:* I am going to allow them to end at six.  
18 If you want to do a counter counter designation, I suppose you  
19 can. They can end there at 184, 6. Okay.

20           So then what?

21           *MR. LEO:* Two more, your Honor.

22           *MR. FEICHT:* There is a completeness issue with 235, I  
23 want the next question and answer read. No objection to the  
24 last designation.

25           *THE COURT:* Page 235. What do you want read?



1           MR. FEICHT: 235, lines 8 through 12.

2           THE COURT: Who said that?

3           MR. MEDGEBOW: Joel Medgebow.

4           THE COURT: Page 235, starting with the words on line  
5 eight, "If Professor Tracy's blog got copied and pasted into  
6 that book by somebody else, would that be reportable outside  
7 activity? No."

8           What does Defense want?

9           MR. FEICHT: "No, but I would bet -- but I would bet  
10 that if Jim Tracy tells me -- I would bet he would not tell me  
11 that he coauthored a book" -- it is completeness argument so we  
12 ask that it be read through line 21.

13          MR. MEDGEBOW: May I respond, your Honor?

14          THE COURT: Hold on. What is the response?

15          MR. MEDGEBOW: Nonresponsive, speculative answer.

16          THE COURT: I will not allow that. Sustained.

17          What is the next one?

18          MR. FEICHT: That is it. We have no objection to the  
19 last designation.

20          MR. MEDGEBOW: You're sustaining the objection or  
21 overruling it?

22          THE COURT: I am ruling in your favor, end it at line  
23 12.

24          MR. MEDGEBOW: Thank you, your Honor.

25          THE COURT: Let's talk about Mr. Johnson. Were you

1     able to make headway on Mr. Johnson?

2             *MR. FEICHT:* Yes, your Honor.

3             *THE COURT:* Have we narrowed it down to certain  
4     isolated portions that are in dispute?

5             *MR. FEICHT:* Yes, we can jump right into it. There is  
6     a dispute about a counter designation. We are going to  
7     withdraw the designation that required a counter designation,  
8     so we are taking out, excuse me, page 25, lines two through 14.

9             *THE COURT:* Okay, I will have you mark that so you are  
10    knowing what you are reading and not reading. I am not the  
11    keeper of designations, please, everybody make appropriate  
12    notes in that regard.

13            *MR. FEICHT:* Sure, I will make sure that is out.

14            That is to address Plaintiff's counter designation  
15    there.

16            Then we do have an objection to Plaintiff's counter  
17    designation on page 55.

18            *THE COURT:* Page 55.

19            *MR. FEICHT:* Plaintiff asked to counter designate 55,  
20    nine through ten.

21            *THE COURT:* Let me look at that. So it starts with an  
22    answer. Is that what you mean?

23            *MR. FEICHT:* Oh, I don't want to speak for the  
24    Plaintiff.

25            *MR. BENZION:* Defendant starts on 55, three through

1 five.

2 THE COURT: Defendant wants three through five.

3 MR. BENZION: And nine through ten.

4 THE COURT: Defendant wants that?

5 MR. BENZION: Correct. We want 55, three through 25.

6 THE COURT: For what reason, completeness?

7 MR. BENZION: Yes, completeness.

8 THE COURT: And why is it being objected to?

9 MR. FEICHT: We do not want line six through eight in  
10 the record, that is a speaking objection of counsel.

11 THE COURT: Line three, "Did Professor Tracy ever  
12 disclose the book Nobody Died at Sandy Hook in a report of  
13 outside employment," and then Mr. Leo, line six, "Objection.  
14 Question now presumes that Tracy had an obligation to report a  
15 book that he didn't write. You can answer the question."

16 Yes, I will sustain that, six through eight comes out,  
17 and so the answer would be, "We will cut to the chase here. I  
18 don't know if he had an obligation to, and I don't know if he  
19 did." That is now what Defendant wants. Now what Plaintiff is  
20 asking is 11 through 25?

21 MR. BENZION: Correct, your Honor.

22 MR. FEICHT: What we are objecting to there --

23 THE COURT: Let me read it first.

24 "Okay, did you ever discuss the article Professor  
25 Tracy wrote that was included in the book Nobody Died at Sandy

1 Hook?" Did you ever discuss that article -- that is me saying  
2 that now.

3 "No.

4 "Okay.

5 "It wasn't relevant. At least it wasn't supposed to  
6 be.

7 "Why wasn't it supposed to be?

8 "Because they were firing him for something else.

9 "Question: What did Professor Tracy's notice of  
10 termination provide, do you recall?

11 "It said that he hadn't turned -- so far we've gotten  
12 hadn't turned in documents, used the computer he wasn't  
13 supposed to be using. I don't think it said anything about the  
14 book about Sandy Hook. Did it?"

15 So, what is the objection.

16 *MR. FEICHT:* The objection is to lines 55, 18 to 19.

17 *THE COURT:* Page 55, lines what?

18 *MR. FEICHT:* 18 through 19.

19 *THE COURT:* Just those two lines?

20 *MR. FEICHT:* Correct. He is supplying the Plaintiff's  
21 subjective belief, this witness is providing subjective beliefs  
22 when they are not the decision maker and do not have personal  
23 knowledge.

24 *THE COURT:* Response.

25 *MR. BENZION:* I don't think that is what he is doing.

1     What he is doing is demonstrating he didn't have a full  
2     understanding of what was happening, so the Plaintiff when he  
3     was being terminated, the reason is -- certain reasons for  
4     alleged termination came in certain letters, and this person  
5     represented the Plaintiff for three weeks and did not have a  
6     great grasp of the facts.

7             *THE COURT:* I will sustain the objection, lines 18  
8     through 19 come out. So, six through eight, and 19 on page 55.

9             What else?

10            *MR. FEICHT:* The next one would be page 66.

11            *THE COURT:* Okay, just a moment.

12            *MR. FEICHT:* Plaintiff raised some objections, we are  
13     going to narrow our designations to try to resolve those  
14     issues.

15            The designations span essentially page 66 through page  
16     69 and what we are agreeing to narrow, this is about document  
17     216-A, based on the Court's ruling --

18            *THE COURT:* Which was 216-A again?

19            *MR. FEICHT:* 216-A, I think it was the one where the  
20     Court had redacted certain lines regarding the Plaintiff's  
21     desire, he doesn't want to settle the case because he doesn't  
22     want to sign the release of the book.

23            *THE COURT:* Defendant's 216-A.

24            *MR. FEICHT:* Yes.

25            *THE COURT:* This was 408 stuff.

1           MR. FEICHT: Yes.

2           THE COURT: So, what is the dispute now?

3           MR. FEICHT: I am withdrawing the designations on page  
4 69 so we do not -- we avoid where there is discussion of  
5 settlement. We are proposing to read page 69, lines seven  
6 through nine, which is the question.

7           THE COURT: "Question: Despite these ongoing  
8 discussions, did Professor Tracy indicate to you that he  
9 planned to write a book about his discipline?"

10          MR. FEICHT: We do not want the speaking objection,  
11 but we do want the answer. He doesn't get into the release of  
12 settlement.

13          THE COURT: 13 through 15?

14          MR. FEICHT: Yes.

15          THE COURT: "No, he didn't say he was going to write a  
16 book. He said if I want to write a book, this would be the  
17 equivalent. If." Okay. And then what?

18          MR. FEICHT: Then through line 22.

19          THE COURT: So, continuing on through 22.

20          MR. FEICHT: Correct.

21          THE COURT: "Did Professor Tracy indicate to you on  
22 January 7, 2016, that despite ongoing discussion with FAU  
23 regarding the proposed discipline, that he was at least  
24 considering writing a book or the equivalent?

25          "It says it right here in the email.

1 "Is that a yes?

2 "Yes."

3 And is that the email that I didn't allow that portion  
4 of it.

5 *MR. BENZION:* Yes, your Honor.

6 *MR. FEICHT:* But these questions and answers don't  
7 refer to the fact that he is writing -- he is discussing the  
8 book in the context of the email related to release. I took  
9 out the part on 68 where it is discussing because of the  
10 settlement you don't want to sign a release.

11 *THE COURT:* What is the response?

12 *MR. BENZION:* Those statements regarding if he wanted  
13 to write a book were statements made in the settlement  
14 discussion. These are the statements that are related to the  
15 Court's prior ruling that were brought up in a settlement  
16 conversation, so they are -- this -- 408 applies to these  
17 statements.

18 *THE COURT:* Okay, I see what is going on. If the only  
19 basis for the objection is the Court's ruling on 216-A, I do  
20 see this is different, because 216-A was very specific. It  
21 said "the prospect of settling for my salary through spring is  
22 not attractive, although I am sure they want this behind them  
23 before the term begins. I imagine I will also have to sign a  
24 release where I cannot discuss the issue. In the long term  
25 that's not fruitful for me, particularly if I want to write

1 about this about as a book or the equivalent."

2 I read that all together, I didn't see how it could be  
3 parceled out, the book part, and I felt the proper ruling was  
4 the one I made under 408 because it was in the context of  
5 settling.

6 I think this is different, what I do think should  
7 happen, in line seven, what should be redacted in the question,  
8 okay, "despite these ongoing discussions," that would come out,  
9 then there would be just a question: Did Professor Tracy  
10 indicate to you on June 7, 2016 that he planned to write a book  
11 about this discipline? That seems fine.

12 The objection comes out -- from ten to 12, that comes  
13 out, doesn't need to be read, and then the answer is 13 through  
14 15, "No, he didn't say he was going to write a book, he said if  
15 I want to write a book, this would be the equivalent" -- and  
16 then that seems fine, and then you start on 15.

17 It would seem to me that what could be read is, did  
18 Professor Tracy indicate to you on January 7, 2016 that he was  
19 at least considering writing a book or the equivalent. In  
20 other words, take out "despite ongoing discussions with FAU  
21 regarding the discipline," you take that out. The question  
22 would be: Did Professor Tracy indicate to you on January 7,  
23 2016 that he wasn't considering writing a book or the  
24 equivalent. 20 should come out, 21 you should come out, and  
25 22, the answer is yes, because that is completely separate from



1 any settlement.

2 Whether Dr. Tracy wanted to write a book or not is not  
3 a settlement discussion. In Dr. Tracy's mind, he was  
4 concerned, it seems, about a settlement because of the impact  
5 it may have on writing a book, but these questions, the way I  
6 redacted them, is simply about did he talk to you about writing  
7 a book, has nothing to do with settlement discussions.

8 I didn't let the part about the book come in in 216-A  
9 because it was too intertwined with the part about settlement,  
10 and I felt prudence should be exercised in not letting any of  
11 it in.

12 This seems entirely different so I will overrule the  
13 objection in part and the Defendant would have to make the  
14 certain redactions I indicated.

15 *MR. BENZION:* May I make a proffer for the record?

16 *THE COURT:* Yes.

17 *MR. BENZION:* The only context and -- evidence of the  
18 context in which a statement about a book was ever made wasn't  
19 in the context of settlement discussion, then all statements  
20 around settlement discussions is excludable under 708.

21 *THE COURT:* This is a discussion between his attorney,  
22 Johnson and him, and I am not letting in anything about  
23 settlement discussions, anything about a prospect of settling  
24 for salary until spring, all of which is in 216-A.

25 You can have a discussion that could include

1 settlement discussions, but you also could be talking about  
2 other things, his writing a book is not part of a settlement  
3 discussion. I haven't seen anything that says if you settle  
4 will with FAU, you can't write a book. Was that part of the  
5 settlement?

6 *MR. BENZION:* That is what the email states, he is  
7 concerned about how a settlement might affect --

8 *THE COURT:* He is concerned, but that is not what was  
9 proffered to me. It was there was a settlement offer or  
10 discussion made about maybe he could be paid his salary through  
11 spring. You proffered it, that is what the attorney said, he  
12 could possibly settle the case with FAU and have his salary  
13 paid through spring, right?

14 *MR. BENZION:* Yes.

15 *THE COURT:* And he would have to sign a release.

16 *MR. BENZION:* The book is related to the release, if  
17 he has to sign a release it might affect his ability to write a  
18 book.

19 This is the only evidence of a book being said in the  
20 context of a settlement discussion, there is no other evidence  
21 outside of a settlement discussion.

22 *THE COURT:* Have you gotten this evidence in about Dr.  
23 Tracy considering writing a book, hasn't it come in already?  
24 Someone testified to it. Didn't someone testify that he was --

25 *MR. LEO:* Dr. Tracy testified over objection that he

1 was writing a book and was working on a book in 2017. That is  
2 the only evidence that there has been, he was working on a book  
3 after he was fired.

4 *MR. FEICHT:* Right, on those designations he said he  
5 was writing a book, but we don't know what the book is about.  
6 These are put in the context, right here, page 69, line nine,  
7 planning to write a book about his discipline, that is why it  
8 is probative. He is writing a book about his discipline which  
9 reveals his state of mind and motivation.

10 *THE COURT:* Let me go on to the others and let me  
11 revisit that.

12 Let's go on, so I can table this one for a moment.

13 Tell me what else is not --

14 *MR. FEICHT:* There is a designation on page 71 and  
15 Defendant is withdrawing that, so the counter designations by  
16 Plaintiff are no longer relevant.

17 We want to make sure both sides are out there.

18 *MR. BENZION:* I don't know that to be the case.

19 *MR. FEICHT:* They are counter designations, we are  
20 removing the designation.

21 *MR. BENZION:* That does not mean I can't counter that  
22 designation to another designation.

23 *THE COURT:* Why don't you see if you want it first,  
24 before we have an argument about something that may not be  
25 arguable.

1           MR. BENZION: That is a good suggestion.

2           MR. FEICHT: This is all about the same email.

3           MR. BENZION: No, I am fine. That whole line, 71, one  
4 through 11?

5           MR. FEICHT: 71, one through 11 and 20 to 23, which we  
6 think makes the counter designation of 71, 12 to 18, and 71, 19  
7 through 72, 23, we are taking out the discussion of the email.

8           THE COURT: It is 1:30, how close are we?

9           MR. FEICHT: The other one we need to address is page  
10 76.

11          THE COURT: Okay, 76.

12          MR. FEICHT: Plaintiff counter designated -- correct  
13 me if I am wrong -- counter designated page 76.

14          THE COURT: Hold on a second.

15          MR. BENZION: We drop the objection to that  
16 designation. Just 21 through 25.

17          MR. FEICHT: Okay, thanks.

18          THE COURT: Okay, tell me what page or line, or did  
19 you resolve it?

20          MR. FEICHT: Page 76, 21 through 25.

21          THE COURT: 21 through 25. So, who wants that in?

22          MR. FEICHT: Plaintiff.

23          THE COURT: Defendant is objecting.

24          MR. FEICHT: Correct.

25          THE COURT: It says, "Okay, do you recall why you

1 considered that you were left in an untenable position?

2 "I do not. I can tell you that being in an untenable  
3 for one claim doesn't mean you are in an untenable position for  
4 another."

5 *MR. FEICHT:* Personal knowledge, he is not sure why he  
6 is saying that and he is speculating as to the potential claims  
7 that he could or could not bring, and there is a portion of  
8 this exhibit that was redacted as far as the First Amendment  
9 claim they were looking at. And so, we don't want this to be  
10 to allow that -- back door that evidence in, and say -- the  
11 question is do you recall. He speculates and says I can tell  
12 you being in an untenable in one claim does not mean you are in  
13 an untenable position for another. That is speculating what  
14 other legal conclusion could be advanced by Dr. Tracy.

15 *THE COURT:* Response.

16 *MR. BENZION:* They want to have him say Dr. Tracy was  
17 in an untenable position and not say that he had good positions  
18 in other positions or had an option to go in other directions.

19 The Court's ruling on the free speech language was  
20 about the quality of the claim, not the fact that he could just  
21 have another claim.

22 So, they are asking this witness to opine that Dr.  
23 Tracy's position with the university was untenable, but not say  
24 he had other positions that he could pursue. It does not seem  
25 fair to have it one way and not the other, your Honor.

1           THE COURT: All right. I am going to overrule, 21  
2 through 25 on page 76 can come in.

3           Is that it other than what I haven't resolved?

4           MR. FEICHT: I have four or five more. I know Dr.  
5 Zoeller is the next live witness. During the afternoon break  
6 we could make progress on that, there are several that we need  
7 to discuss.

8           THE COURT: Put it on the record right now, so tell  
9 me -- just tell me page and line the remaining unresolved ones.

10          MR. FEICHT: From the Defendant's position there is an  
11 objection by Plaintiff to lines 92, 19 --

12          THE COURT: Page 92 --

13          MR. FEICHT: Page 92, line 19.

14          THE COURT: Page 92, line 19 through.

15          MR. FEICHT: 93, line 13. And we are willing to stop  
16 at page 93, line four.

17          THE COURT: What do you mean, you are willing to stop?

18          MR. FEICHT: We are stopping the designation to  
19 hopefully resolve Plaintiff's objection to it.

20          THE COURT: Does that resolve it?

21          MR. BENZION: 92, 19, to 93 --

22          MR. FEICHT: 93, 13 was the original objection, and  
23 then continues through 93 and 94, and we are going to stop at  
24 93, four.

25          MR. BENZION: Just 93, four?

1           MR. FEICHT: Correct.

2           MR. BENZION: You are not going to do 93, 18 through  
3 23?

4           MR. FEICHT: Correct.

5           MR. BENZION: And 93 through 95, six.

6           MR. FEICHT: Correct.

7           MR. BENZION: There is still a relevance objection.

8           THE COURT: Okay, is it resolved or not resolved?

9           MR. BENZION: No.

10          THE COURT: Page 92, line nine through 93, line four  
11 on relevancy.

12          What is the next unresolved one?

13          MR. FEICHT: Page 98, line 12 through 99, line one.

14          THE COURT: Page 99, line one.

15          MR. FEICHT: That is Plaintiff's counter designation.

16          THE COURT: Who is objecting there?

17          MR. FEICHT: Defendant is objecting it is relevant to  
18 the claim that was dismissed.

19          THE COURT: Next one?

20          MR. FEICHT: Another one we tried to narrow the  
21 designation to deal with the objections.

22          Line --

23          THE COURT: Page.

24          MR. FEICHT: Sorry, page 1 -- we are going to withdraw  
25 101, two to 19.

1           *THE COURT:* I will let you say that first and let's  
2 see if there is a dispute.

3           *MR. FEICHT:* To try to resolve the objection of the  
4 Plaintiff, we designated -- starting 101, 25, it takes out the  
5 question and answer which I think is the main portion of the  
6 objection there.

7           *THE COURT:* Plaintiff, does that resolve it?

8           *MR. BENZION:* It seems so, as long as the exhibit  
9 being referred to doesn't contain hearsay or the hearsay is not  
10 here.

11          *THE COURT:* What else is remaining?

12          *MR. FEICHT:* There is something I need to look at,  
13 Plaintiff has not provided -- we are still going over the  
14 designations of page 18, Docket Entry 430, and that is -- as  
15 far as the Defendants are concerned, based on what we know what  
16 the Plaintiff intends to counter designate, that resolves our  
17 issues to those. I don't know if there are any objections that  
18 remain.

19          *MR. BENZION:* I definitely made more objections that  
20 we covered. Are you telling Plaintiff you are withdrawing some  
21 of the other objections that you have not raised to the Court  
22 right now, such as one -- designations 143, 13 through 15?

23          *MR. FEICHT:* We didn't get to that page, I don't know  
24 what the objections are there. Page 18 we didn't cover.

25          *MR. BENZION:* I guess we didn't get to that.



1           *THE COURT:* That is it for now?

2           *MR. MEDGEBOW:* That is it for now.

3           *THE COURT:* Our jurors are here. And the next witness  
4 is here?

5           *MR. MEDGEBOW:* Correct, your Honor.

6           *THE COURT:* Okay, I will be right back.

7           (Pause.)

8           *THE COURT:* All right. We can bring our jury back in.

9           *MR. LEO:* Your Honor, I want to address one matter  
10 regarding the witnesses testifying after the --

11           *THE COURT:* Yes.

12           *MR. FEICHT:* For Dr. Zoeller, he is a former  
13 Defendant, so he was sued as part of the union Defendants that  
14 entered a settlement agreement. Before the jury is brought in,  
15 we wanted to give Dr. Zoeller an instruction not to discuss the  
16 fact that he was sued and reached a settlement as well as not  
17 to discuss the faculty senate meeting as well. That was an  
18 issue brought up in his deposition, and he doesn't know that  
19 that topic has been excluded.

20           *THE COURT:* Do you want the Court to say that or  
21 counsel can tell him that?

22           *MR. LEO:* I am okay with counsel saying it.

23           *THE COURT:* Why don't you go out and let him know  
24 that, and then can you bring him in.

25           *MR. FEICHT:* Do we want to do the cross designations

1 of Moats?

2 MR. LEO: Yes.

3 THE COURT: Yes. So, yes, you can, with that  
4 agreement, let Dr. Zoeller know those parameters.

5 Okay, so we will bring our jury in.

6 (Thereupon, the jury returned to the courtroom).

7 THE COURT: All right. Welcome back, you may be  
8 seated.

9 Now, you had the deposition reading through video of  
10 Michael Moats by the Defendant. Now the Plaintiff has certain  
11 portions of Michael Moats' deposition that the Plaintiff wants  
12 to present. It is not going to be done by video, there is role  
13 playing. Counsel here is playing Mr. Moats, and counsel, there  
14 is playing counsel.

15 The question is as if it were a question from the  
16 attorney and the answer from Mr. Moats.

17 You may proceed.

18 (Thereupon, the deposition cross designations were  
19 read.)

20 MR. LEO: That is all, your Honor.

21 THE COURT: Okay. So, was there anything further from  
22 Defense?

23 MR. FEICHT: Not for this witness, your Honor.

24 THE COURT: All right. The witness already stepped  
25 down there.

1           Okay, so, with that, does Defense have your next  
2 witness?

3           MR. FEICHT: Yes, the Defense witness would like to  
4 call Robert Zoeller, Jr. to the stand.

5           THE COURT: Okay, he may come into the courtroom and  
6 take the stand.

7           ROBERT ZOELLER, DEFENDANT'S WITNESS, SWORN

8           THE WITNESS: My name is Robert Zoeller, R-O-B-E-R-T,  
9 Z-O-E-L-L-E-R.

10                           **DIRECT EXAMINATION**

11       BY MR. FEICHT:

12       Q. Dr. Zoeller, are you a member of the union for faculty  
13 members, United Faculty of Florida, also known as UFF?

14       A. Yes, I am.

15       Q. Do you hold any positions with the local chapter of UFF at  
16 FAU?

17       A. I am currently vice-president and a member of the grievance  
18 committee.

19       Q. And were you previously president of UFF FAU?

20       A. Yes, for three years.

21       Q. Which years were you president?

22       A. 2014-15, 15-16, 16-17.

23       Q. So, did you serve as president of UFF after Dr. Tracy  
24 served as president of UFF from 2009 to 2011?

25       A. Yes.

1 Q. And did your term as president of UFF include the time  
2 period of November 2015 through January 2016, when Professor  
3 Tracy was disciplined and ultimately terminated by Florida  
4 Atlantic University?

5 A. Yes.

6 Q. What were your responsibilities as president of UFF?

7 A. My responsibilities specifically at that time, I was a  
8 member of the grievance committee. As president, you are ex  
9 officio or automatically a member of the union senate, state  
10 wide unit senate, and ex officio member of any committees of  
11 the chapter.

12 Q. And is it your role as a member of the faculty union to  
13 support and protect faculty members such as Dr. Tracy in any  
14 disputes that may occur with the employer, FAU?

15 A. I think it is more specifically we are there to protect the  
16 faculty members' rights under the collective bargaining  
17 agreement.

18 Q. Okay. Who is Michael Moats?

19 A. Michael Moats is the service unit representative over the  
20 area of South Florida. He is support for the chapters in his  
21 designated area.

22 Q. We heard his testimony earlier today by video deposition.  
23 Could you tell me, based on your personal experience, how Mr.  
24 Moats was involved with Dr. Tracy's discipline in 2015?

25 A. Well, early on when Dr. Tracy received a letter of

1 reprimand he wasn't very much involved at all. He didn't  
2 become involved until, as I recall, until he received the  
3 letter of termination.

4 He did attend one meeting of the grievance committee when  
5 we initially made a decision not to file a grievance on the  
6 original letter of reprimand that he received. He did not vote  
7 in that meeting, he was therefore advice and counsel.

8 Q. As members of the union, did both you and Michael Moats  
9 provide advice to Dr. Tracy regarding his discipline and the  
10 proposed termination by FAU in 2015?

11 A. In terms of the termination?

12 Q. Yes.

13 A. Yes.

14 Q. Okay. As president of the union and member of the  
15 grievance committee, did you file a grievance every time a  
16 complaint was raised by a faculty member?

17 A. No.

18 Q. Why not?

19 A. Well, basically a grievance is for the purpose of -- if  
20 there is an identified violation of the collective bargaining  
21 agreement, the purpose of the grievance is to dispute that and  
22 try to resolve the violation of the collective bargaining  
23 agreement. Not everything is a violation of the collective  
24 bargaining agreement.

25 Q. I want to get you a copy of that collective bargaining

1 agreement.

2 MR. FEICHT: Your Honor, we would move at this time  
3 Defendant's Exhibit 2 which was previously admitted as  
4 Plaintiff's 87.

5 THE COURT: Any objection to Defendant's 2?

6 MR. LEO: No objection.

7 THE COURT: That is admitted without objection.

8 (Whereupon Defense Exhibit 2 was marked for evidence.)

9 BY MR. FEICHT

10 Q. So, Dr. Zoeller, putting you in context in 2015, was it  
11 your role as a member of the grievance committee to determine  
12 whether a complaint by a faculty member was a violation of the  
13 terms of the collective bargaining agreement in Exhibit 2?

14 MR. LEO: Objection, leading.

15 THE COURT: You can rephrase.

16 BY MR. FEICHT:

17 Q. What was your role in relation to the collective bargaining  
18 agreement and faculty complaints regarding Defendant's Exhibit  
19 2?

20 A. Well, if the complaint comes to us we identify if there is  
21 in fact a violation of the collective bargaining agreement, and  
22 if there is, we file a grievance based on whatever articles may  
23 be involved in it.

24 Q. Could you explain what an annual assignment is for a  
25 professor at Florida Atlantic University?

1 A. Um-m-m, okay, it is pretty much what it says, every year --  
2 typically a professor's role is pretty full, it is research,  
3 teaching and service, which encompasses what we call faculty  
4 sitting on committees and service to the profession, being  
5 involved in a professional organization.

6 So, each year the department chair is supposed to sit down  
7 with the faculty member and they determine what that faculty  
8 member's goals are for that year in terms of teaching, service  
9 and research.

10 Q. When faculty members submit the annual assignment, are they  
11 required to make any acknowledgments?

12 A. Well, they -- yes. There is a -- we sign it  
13 electronically, there is a drop down box on there, and I am  
14 paraphrasing, but it says something to the effect it is a term  
15 and condition of employment that you recognize an obligation  
16 to -- to, um-m-m, reveal -- reveal is not the best word, but  
17 to -- I will say reveal outside activity and that's consistent  
18 with Article 19 of the collective bargaining agreement and  
19 university policy. To disclose I think would be a better term.

20 MR. FEICHT: Your Honor, may we publish Defendant's 81  
21 already admitted into evidence?

22 THE COURT: Yes.

23 BY MR. FEICHT:

24 Q. Is this the acknowledgment you just referred to, Dr.  
25 Zoeller?

1 A. That certainly looks like it, yes.

2 Q. Is it your understanding that all faculty members must  
3 affirmatively click "okay" on this box and acknowledge their  
4 obligation to disclose outside activity to the university?

5 A. Yes.

6 Q. Do you know what the purpose of this affirmation and  
7 disclosure obligation is within the CBA?

8 A. Well, the reading of Article 19 basically says that the  
9 university has an obligation to manage conflicts of interest,  
10 and so, the idea of the outside activity form is to be able to  
11 look at any -- the collective bargaining agreement says  
12 compensated or uncompensated professional activity, and the  
13 idea is to allow the university to decide if in fact a conflict  
14 of interest exists.

15 If it does, then it also states in there that there is an  
16 opportunity for the professor, or the employee, and the  
17 university to sit down and try to mediate the conflict to  
18 resolve the issue.

19 MR. FEICHT: May I approach the witness, your Honor?

20 THE COURT: Yes.

21 BY MR. FEICHT:

22 Q. Dr. Zoeller, I hand you a document previously marked for  
23 identification purposes as Defendant's Exhibit 45. Do you  
24 recognize this document?

25 A. I recognize the emails, yes.



1 Q. And did you send or receive all of the emails in that  
2 exhibit?

3 A. I believe so, yes.

4 Q. And do the emails reflect statements by Professor Tracy and  
5 emails to Professor Tracy where you are notifying him of the  
6 union's advice?

7 A. Yes.

8 MR. FEICHT: At this time we move Defendant's 45 into  
9 evidence.

10 THE COURT: Any objection?

11 MR. LEO: No, your Honor.

12 THE COURT: Okay, Defendant's 45 admitted without  
13 objection.

14 MR. FEICHT: May we publish it to the jury, your  
15 Honor?

16 THE COURT: Yes.

17 (Whereupon Defense Exhibit 45 was marked for evidence.)

18 BY MR. FEICHT:

19 Q. Dr. Zoeller, I want to focus your attention to a portion  
20 highlighted on the screen there. Below that do you see the  
21 date here?

22 At this point in time, November 10, 2015, had Professor  
23 Tracy's supervisor instructed him of the policy obligations  
24 when he submitted his assignment for the current academic year?

25 A. Yes.

1 Q. At this point in time, had Professor Tracy been disciplined  
2 by the university yet?

3 A. No. Not that I am aware of.

4 Q. Did you advise Professor Tracy, "did you sign the outside  
5 activity portion or not? I've always been advised by those  
6 more experienced in these matters to sign now and fight after."

7 A. Yes, it is a takeoff on an old union expression, comply now  
8 and fight later.

9 Q. What is the purpose of this sign now and fight after or  
10 sign now, grieve after? What is the purpose of that advice?

11 A. To avoid being charged with insubordination.

12 Q. And were you advising Dr. Tracy before he received any  
13 discipline from the university to sign the outside activity  
14 forms to avoid a charge of insubordination?

15 A. I didn't say it explicitly, but I assume someone who had  
16 been president of the union for several years and active in the  
17 union, he would understand that language.

18 MR. LEO: Objection, move to strike the testimony,  
19 speculation.

20 THE COURT: Sustained. And I will ask the jury to  
21 disregard the last portion of the witness' testimony.

22 BY MR. FEICHT:

23 Q. As a former president of UFF FAU yourself, what is your  
24 understanding of the risks the faculty member faces who does  
25 not comply with the supervisor's instruction and deemed to be

1 insubordinate by the university?

2 MR. LEO: Objection, relevance.

3 THE COURT: Overruled.

4 THE WITNESS: I am sorry, could you repeat the  
5 question.

6 BY MR. FEICHT:

7 Q. As a former president of UFF FAU, what is your  
8 understanding of the risks to a faculty member who does not  
9 comply with the supervisor's instruction and deemed to be  
10 insubordinate by the university?

11 A. Insubordination is one of those things which is listed  
12 under what is called just cause under Article 16, which is  
13 justification for termination.

14 Q. So, a faculty member at Florida Atlantic University can be  
15 terminated even if they are tenured?

16 MR. LEO: Objection, leading.

17 THE COURT: Sustained.

18 BY MR. FEICHT:

19 Q. Can a faculty member who is tenured be terminated under the  
20 collective bargaining agreement if they are determined to be  
21 insubordinate?

22 A. Yes.

23 Q. Regardless of Professor Tracy's knowledge as a former  
24 president of UFF, did you advise him to sign now and fight  
25 after?

1 A. Yes.

2 Q. Did he follow that advice?

3 A. Um-m-m, yes and no. And I don't remember the timing of  
4 this, but he was going back and forth as department chair and  
5 at one point, to avoid signing the acknowledgment, what he did  
6 was he printed out the annual assignment, and he signed that by  
7 hand.

8 Q. Okay. I think that is the email above this. Can we blow  
9 up that one. Thank you.

10 Is this what you were just referring to, that Professor  
11 Tracy printed and physically signed his signature to avoid the  
12 electronically signing policy?

13 A. Yes.

14 *THE WITNESS:* Would it be possible to get any water?

15 *THE COURT:* Yes.

16 *MR. FEICHT:* Your Honor, may I publish Defendant's  
17 Exhibit 25, which is previously admitted into evidence?

18 *THE COURT:* Yes.

19 *BY MR. FEICHT:*

20 Q. Dr. Zoeller, when did you first learn that Professor Tracy  
21 had not signed the outside activity forms?

22 A. I believe it was this letter, to the very best of my  
23 recollection, that is the first time I learned of it.

24 Q. Can we blow up the first paragraph, please.

25 Dr. Zoeller, you got a drink of water. I want to focus you

1 on this letter. It states that "despite numerous requests from  
2 your supervisor, David Williams, Director of the School of  
3 Communication and Multimedia Studies, and Linda Johnson,  
4 Associate Dean of the Dorothy F. Schmidt College of Arts and  
5 Letters, you have refused to sign your revised 2015-2016 FAIR  
6 annual assignment"; is that correct?

7 A. Well, my understanding is he refused to sign the electronic  
8 version.

9 Q. And the next sentence points out that all employees are  
10 required to acknowledge receipt of the annual assignment  
11 through the FAIR system. Is that referring to the electronic  
12 assignment in the check box in Defendant's 81?

13 A. Yes.

14 Q. And Professor Tracy was advised by Florida Atlantic  
15 University as of November 10, 2015, that his refusal to do so  
16 constitutes insubordination, correct?

17 A. Yes.

18 Q. We could pull that down and blow up the paragraph beginning  
19 also, as well as the next two paragraphs, your refusal and  
20 also.

21 I want to draw your attention to those paragraphs.

22 Dr. Zoeller, was it your understanding that Florida  
23 Atlantic University was directing him to not only acknowledge  
24 receipt of his annual assignment, with all terms and  
25 conditions, but also to submit a report of outside

1 employment/activity forms for 2013-14, 2014-15, and 2015-16?

2 MR. LEO: Objection, leading.

3 MR. FEICHT: The document speaks for itself, your  
4 Honor.

5 THE COURT: Overruled.

6 THE WITNESS: Yes.

7 BY MR. FEICHT:

8 Q. What did you advise Professor Tracy once you read this  
9 letter?

10 A. I think I said something to the effect that -- I think I  
11 said something like sign it or -- I said, even if you say under  
12 duress, sign it, say you did it under duress to do it.

13 Q. You told him to submit the forms?

14 A. I believe so, yes, that is the best of my recollection. I  
15 am sure you have the emails that say that.

16 Q. Why did you recommend that Dr. Tracy fill out those outside  
17 activity forms in November 2015?

18 A. I was afraid he was going to get fired.

19 Q. And were you advising Dr. Tracy to try to help him keep his  
20 job?

21 A. Yes.

22 Q. And did you think by filling out the forms within 48 hours  
23 as requested by his dean that Professor Tracy would have  
24 avoided a charge of insubordination?

25 MR. LEO: Objection, calls for speculation.

1           *THE COURT:* Well, the witness can't speculate, so, I  
2 am not sure how he would know.

3           *MR. FEICHT:* Based on previous experience as president  
4 of the union and grievance chair with many years of experience.

5           *THE COURT:* Can you frame it that way?

6           *BY MR. FEICHT:*

7           *Q.* Dr. Zoeller, based on your previous role as president of  
8 the union and the grievance chair, did you think if Dr. Tracy  
9 complied with this directive, he could have avoided a charge of  
10 insubordination?

11          *A.* Possibly.

12          *Q.* Were you acting in Dr. Tracy's best interest when you  
13 advised him to fill out the outside activity forms?

14          *A.* I believe so, yes.

15          *Q.* Based on your personal experience and your interactions  
16 with Dr. Tracy, did he seem to appreciate the gravity of this  
17 notice of proposed discipline and act in his own best interest?

18          *MR. LEO:* Objection, calls for speculation.

19          *MR. FEICHT:* I asked based on personal experience and  
20 personal interactions with the Plaintiff.

21          *THE COURT:* The witness may testify about your  
22 personal observations, but clearly you don't necessarily know  
23 what was in Dr. Tracy's mind, so you shouldn't testify about  
24 anything speculative. You can testify as to any firsthand  
25 knowledge of your observations.

1           *THE WITNESS:* I know when he was terminated, and that  
2 was actually the first time that I actually talked to him, most  
3 of the other communications were via email, I said, you know,  
4 if you thought the university was after you, why did you make  
5 it so easy for them? And he said -- I was referring to not  
6 filling out the forms, and he said, I thought tenure would  
7 protect me.

8           *MR. FEICHT:* Your Honor, may I publish Defendant's  
9 111, which is previously admitted into evidence?

10          *THE COURT:* Yes.

11          *BY MR. FEICHT:*

12          *Q.* Dr. Zoeller, do you see the screen here with Defendant's  
13 111? Do you recognize this document?

14          *A.* I do.

15          *Q.* Was that your email address at the time,  
16 president@uff-fau.org?

17          *A.* That was one of my emails, yes.

18          *Q.* Okay. Is this -- what is up on the screen here, is that an  
19 email you received from the Plaintiff, James Tracy?

20          *A.* Yes, it is.

21          *Q.* I want to focus your attention on the third paragraph  
22 beginning "more broadly." I'm sorry, the fourth paragraph  
23 beginning "So Doug." I want to focus your attention on this  
24 sentence right here. (Indicating.)

25          Did Dr. Tracy admit to you on November 24th, before



1 receiving notice of proposed discipline, termination, that in  
2 terms of the specific description of insubordination and my  
3 actions it is cut and dry?

4 A. Yes.

5 Q. Based on your interactions and communication with Dr.  
6 Tracy, was it your understanding that he knew that he had been  
7 charged with insubordination based on his own actions?

8 A. Um-m-m --

9 MR. LEO: Objection, calls for speculation.

10 THE COURT: Well, the witness is being asked what his  
11 understanding is of what Dr. Tracy knew.

12 I think you need to rephrase so it does not call upon  
13 speculative testimony.

14 BY MR. FEICHT:

15 Q. Dr. Zoeller, did you agree with Professor Tracy's  
16 assessment, given the description of insubordination and Dr.  
17 Tracy's own actions, that it was cut and dry insubordination?

18 A. Very much so.

19 Q. Who were the members of the UFF grievance committee in  
20 November 2015?

21 A. It was myself, Tim Lenz, Dr. Tim Lenz, and Dr. Doug  
22 McGetchin.

23 Q. Did the four of you -- excuse me, the three of you,  
24 yourself, Doug McGetchin, and Tim Lenz, did the three of you  
25 come to any conclusion as to whether the letter of proposed

1 discipline by FAU to James Tracey was a violation of the  
2 collective bargaining agreement?

3 A. Collectively, we did not see that there was a violation.

4 Q. Why not?

5 A. Well, because it was our understanding that he had been  
6 engaged in reportable outside activity and he was not reporting  
7 it as requested by the university.

8 Q. Which specific activities were you aware of that Dr. Tracy  
9 was involved in in November 2015?

10 A. Let's see, there was a memoryhole blog. He was active with  
11 a website called research, a research website, I can't remember  
12 the name off the top of my head.

13 Q. Global Research?

14 A. Yes, a Canadian website.

15 He had been publishing, submitting articles there. He  
16 had -- I am not technological, I call it a radio show, a  
17 podcast, it was called Real Politik, he was doing that  
18 regularly. And just at that time, I think in mid October, a  
19 book was published called No One Died at Sandy Hook and listed  
20 him as a coauthor.

21 Q. I want to focus --

22 MR. LEO: Objection, mischaracterization and move to  
23 strike.

24 THE COURT: I will -- the evidence will speak for  
25 itself.

1           If the witness isn't sure -- you said I think that he  
2 published a book and listed him as a coauthor. I will have the  
3 record speak for itself, the evidence that has come in on that  
4 issue, and have the jury consider the evidence that has come in  
5 on that issue.

6 *BY MR. FEICHT:*

7 *Q.* Was it your understanding, Dr. Zoeller, that Dr. Tracy  
8 contributed articles or chapters to that book, Nobody Died at  
9 Sandy Hook?

10 *MR. LEO:* Objection, leading.

11 *THE COURT:* Sustained.

12 *BY MR. FEICHT:*

13 *Q.* Let me ask you this way: Did you determine that Dr. Tracy  
14 contributed material to the book Nobody Died at Sandy Hook?

15 *A.* Well, I have gone online and I have seen the book online  
16 and I have seen the book chapter with his name on it and FAU  
17 credentials and he is listed as an author of an appendix, a  
18 time line.

19 *MR. FEICHT:* May I approach the witness, your Honor?

20 *THE COURT:* Yes.

21 *BY MR. FEICHT:*

22 *Q.* I hand you what is previously marked in evidence as  
23 Defendant's Exhibit 3. Is this the book you are referring to?

24 *A.* I believe so, it looks like it, yes.

25 *Q.* And did you know in 2015 that Dr. Tracy had contributed

1 articles to that book?

2 A. Well, I saw it online, and I saw that his name was on it.

3 MR. LEO: Objection, speculation, move to strike.

4 THE COURT: Overruled.

5 BY MR. FEICHT:

6 Q. I want to focus on the memoryhole blog.

7 Why was Professor Tracy's memoryhole reportable under the  
8 collective bargaining agreement?

9 MR. LEO: Objection, calls for speculation. The  
10 witness said he does not -- he doesn't know about the blog.

11 THE COURT: Overruled. The witness can answer if he  
12 is able to.

13 THE WITNESS: All these activities, including the  
14 blog, were in line with what he did professionally, the  
15 conspiracy theories, the media critiquing, media criticism, so,  
16 these were things that were virtually -- that were arguably an  
17 extension of what he did professionally.

18 BY MR. FEICHT:

19 Q. And was it your understanding that Professor Tracy taught  
20 classes at FAU, including Culture of Conspiracy, and  
21 contributed assigned research regarding conspiracy theories  
22 that were discussed on the memoryhole blog?

23 MR. LEO: Objection, leading.

24 THE COURT: Sustained. Rephrase.

25

1 *BY MR. FEICHT:*

2 Q. Did you know Professor Tracy addressed topics in his class  
3 and part of his assigned research on topics that were discussed  
4 in his -- on his blog?

5 *MR. LEO:* Objection, leading.

6 *THE COURT:* Ask the witness if he knew what was taught  
7 in his class.

8 *BY MR. FEICHT:*

9 Q. Okay. What did Professor Tracy teach at FAU?

10 A. There was a class on conspiracy, I don't know specifically  
11 what he taught there. I can't speak directly to what was  
12 taught.

13 Q. Did he teach a class called Culture of Conspiracy?

14 A. Yes.

15 Q. Did he perform academic --

16 *MR. LEO:* Objection, leading.

17 *THE COURT:* You can't object in the middle of the  
18 question, it makes for a bad record, and I can't rule if I  
19 can't hear the question.

20 Wait until the question is asked, and if the witness  
21 would pause a moment before you answer the question, and I will  
22 rule on the objection.

23 *MR. FEICHT:* I will start the question over again.

24 *THE COURT:* Okay.

25

1 BY MR. FEICHT:

2 Q. Did Dr. Tracy perform research as part of his annual  
3 assignment at Florida Atlantic University regarding conspiracy  
4 theories?

5 A. Yes, I believe he chaired and in one of the email  
6 exchanges, he shared some of that. There were things that were  
7 on the department web page where they were talking about some  
8 of his work and that sort of thing, so, yes, that is my  
9 understanding.

10 Q. Why was the fact that Professor Tracy's blog was similar to  
11 what he was researching and teaching professionally considered  
12 by you as president in coming to the conclusion that his blog  
13 was in fact reportable?

14 MR. LEO: Objection, leading.

15 THE COURT: Overruled.

16 THE WITNESS: Well, for the time I told you, it was so  
17 closely aligned with what he was doing professionally and,  
18 arguably, what gave it credibility was his academic  
19 credentials.

20 Subsequent to that, I don't remember specifically when  
21 I discovered that he was soliciting money on the website -- on  
22 the blog site. There was a donate button, and when you hit the  
23 donate button, one of the things you were contributing to was  
24 memoryhole behind research, and that is clearly something, if  
25 you are doing independent research, it is an outside

1 professional activity.

2 Q. Pull up Defendant's 2, the CBA admitted into evidence, page  
3 54, please.

4 While we are getting that document pulled up, what was the  
5 significance of Professor Tracy soliciting donations for  
6 research on his memoryhole blog?

7 MR. LEO: Objection, mischaracterization.

8 THE COURT: Overruled.

9 MR. FEICHT: Page 54, please. Let's try -- maybe a  
10 couple more. Back one, 57.

11 BY MR. FEICHT:

12 Q. Before we get to this, what was the significance of the  
13 donate now button on Professor Tracy's memoryhole blog?

14 A. Now it is no longer -- you are going beyond uncompensated  
15 and now you are moving to compensated, and I am not necessarily  
16 sure it would change the fact that it was a violation.

17 Q. And is compensation one factor that could potentially lead  
18 to a conflict of interest with the university?

19 A. Yes. As a matter of fact, I think the issue of  
20 compensation is governed more specifically by the Florida  
21 Statute.

22 Q. You mentioned research. Is this the provision of the  
23 collective bargaining agreement that you were analyzing to  
24 determine whether or not Professor Tracy's Notice of Discipline  
25 was grievable based on the language of the collective

1 bargaining agreement?

2 A. Yes. That among other things, yes.

3 Q. Did Professor Tracy ever use university equipment or  
4 resources for his work on his outside activities?

5 A. Um-m-m, he told me that he used a computer. Am I allowed  
6 to repeat what other union colleagues informed me?

7 *THE COURT:* You shouldn't bring in other statements.

8 *BY MR. FEICHT:*

9 Q. You can say what Dr. Tracy told you.

10 A. He said he used his computer.

11 Q. Okay.

12 A. He said, I didn't damage it.

13 Q. Are faculty members, including Dr. Tracy, required to  
14 disclose their use of university resources in outside activity  
15 forms?

16 A. Yes.

17 Q. Are you aware of Professor Tracy disclosing the use of  
18 university resources in outside activity relating to his blog,  
19 book or podcast?

20 A. I am not aware of any, no.

21 *MR. FEICHT:* May I approach, your Honor?

22 *THE COURT:* Yes.

23 *BY MR. FEICHT:*

24 Q. Dr. Zoeller, I hand you Defendant's 48. Do you recognize  
25 this document?



1 A. Yes.

2 Q. What is it?

3 A. It is an email chain between me and Dr. Tracy, I believe.

4 Q. And did you exchange these emails in this document with Dr.  
5 Tracy on December 1, 2015?

6 A. Yes.

7 Q. And did you -- are the emails within Defendant's 48 either  
8 emails from Dr. Tracy or emails to Dr. Tracy notifying him of  
9 the grievance committee's decision?

10 A. Yes.

11 MR. FEICHT: Your Honor, at this time I move 48 into  
12 evidence.

13 THE COURT: Any objection?

14 MR. LEO: No objection.

15 THE COURT: 48 is admitted without objection.

16 (Whereupon Defense Exhibit 48 was marked for evidence.)

17 MR. FEICHT: May we publish this to the jury?

18 THE COURT: Yes.

19 BY MR. FEICHT:

20 Q. Blow up both emails, please.

21 In reverse chronological order, I want to start with Dr.  
22 Tracy's email to you.

23 On December 1st, 2015, did Dr. Tracy know that he could  
24 begin the grievance process by himself without UFF?

25 A. Yes.

1           MR. LEO: Objection, calls for speculation.

2           THE COURT: Well, why don't we have the witness say  
3 what is in the writing.

4 BY MR. FEICHT:

5 Q. Dr. Tracy told you, "I will need to know if I should go  
6 ahead and begin grievance by myself"?

7 A. Well, my understanding, yes, he clearly understood he could  
8 file a grievance on his own. Again, he was past president of  
9 the union.

10 Q. Okay. When he asked you this on December 1st, what did you  
11 tell him in response on December 1st?

12 A. I said we had met and we found -- our decision was it was  
13 not grievable.

14 Q. What did you mean?

15 A. That it was not a violation of the collective bargaining  
16 agreement, if we filed a grievance, we would not win.

17 Q. Did Professor Tracy have time to still file a grievance by  
18 himself?

19 A. Yes. Just to give you a quick background and not elaborate  
20 too much, we met on that date, I wanted to make sure he had  
21 plenty of time that if he chose to file on his own, that he  
22 could.

23 He received the letter -- the letter was dated -- the  
24 reprimand was dated November 9th. You have 30 days to file a  
25 grievance. He said he didn't file it -- he didn't receive it

1     until the 19th, that could be the time -- to be on the safe  
2     side we used the 9th as a date. If we decided not to file, he  
3     had plenty of time to file.

4             I notified him on the 1st, he had until -- 30 days -- so he  
5     had nine days in which he could file.

6     Q. Did the content of Dr. Tracy's blog post play any role in  
7     the grievance committee's decision that his discipline was not  
8     grievable?

9     A. When you say content, only in the sense it was so closely  
10    aligned to what he was doing professionally, not the  
11    controversial aspect of the blog. That didn't come up at the  
12    meeting.

13    Q. You didn't discuss at the meeting when deciding whether or  
14    not it was grievable, meaning it was a violation of the  
15    collective bargaining agreement, the very controversial  
16    opinions he had about the Sandy Hook shooting?

17             MR. LEO: Objection, leading.

18             THE COURT: Rephrase.

19    BY MR. FEICHT:

20    Q. Did you discuss the Sandy Hook school shooting and Dr.  
21    Tracy's feelings that it didn't happen and it was a FEMA gun  
22    control --

23             MR. LEO: Objection, leading.

24             THE COURT: Did you rephrase?

25             MR. FEICHT: I asked did he.

1           *THE COURT:* Overruled.

2           *THE WITNESS:* No. I don't remember. We had a whole  
3 lot of stuff going on that day, I don't recall we discussed  
4 that.

5           My recollection was, do we have a violation of the  
6 collective bargaining unit? No. My answer is, to the best of  
7 my recollection, no, we did not.

8           *BY MR. FEICHT:*

9           *Q.* Did the union do anything to prevent Professor Tracy from  
10 filing a grievance?

11          *A.* No, and we can't. If he chooses to file a grievance on his  
12 own, I certainly don't have that authority, so he -- we  
13 couldn't stop him.

14          *Q.* Did the union eventually hire a lawyer at the union's cost  
15 to represent Professor Tracy?

16          *A.* Yes. I believe he received a letter of termination on the  
17 16th, and I think -- I believe by the 18th we had hired -- the  
18 union hired an attorney for him.

19          *Q.* And did that attorney have time to file a grievance  
20 regarding the eventual notice of proposed discipline,  
21 termination that came in December?

22          *A.* Oh, yes.

23          *Q.* Did you and Michael Moats assist Professor Tracy's lawyer  
24 to prepare a draft regarding the termination?

25          *A.* Michael Moats, I didn't participate in that.

1       At that point of time, it is my understanding I was pretty  
2 much out of it. I moved to another level.

3       Michael -- well, he was primary -- he was taking the lead  
4 on this, put it that way.

5       Q. Professor Tracy's own lawyer was taking the lead?

6       A. Right, but in terms of writing a grievance for the attorney  
7 and for Dr. Tracy, Michael Moats did that.

8       Q. Do you remember the name of Professor Tracy's lawyer?

9       A. Tom Johnson.

10      Q. Did Tom Johnson tell Professor Tracy that he had a weak  
11 case against the university?

12               MR. LEO: Objection, hearsay.

13               MR. FEICHT: Agent, nonparty.

14               THE COURT: Response.

15               MR. LEO: He didn't ask when. Lack of foundation.

16               THE COURT: So, you can establish that.

17               MR. FEICHT: I'm sorry, your Honor?

18               THE COURT: The objection was you haven't established  
19 a foundation. If he made the statement, at what point? Was he  
20 his agent at that time is the nature of the objection.

21               MR. FEICHT: Thank you.

22       BY MR. FEICHT:

23       Q. Dr. Zoeller, when you had conversations with Dr. Tracy's  
24 lawyer, Thomas Johnson, were they during the time period in  
25 which Mr. Johnson represented Professor Tracy?

1 A. Yes, we had a conference, oh, I think it was December 19th  
2 or 20th.

3 Q. Okay. And did Dr. Tracy's own lawyer, Thomas Johnson admit  
4 to you that Professor Tracy had a weak case against the  
5 university?

6 A. He said he felt it wasn't a strong case. That is what he  
7 said.

8 Q. Have you ever submitted a report of -- outside activity  
9 report before?

10 A. Um-m-m, yes.

11 Q. Are you aware of other faculty members being instructed by  
12 the university, like Dr. Tracy, to submit reports of outside  
13 activity?

14 A. Yes.

15 Q. What did you instruct those other faculty members to do  
16 when instructing to submit a report of outside activity?

17 A. I tell them to report it. More recently, a couple of  
18 people, I actually helped them, they had simple questions, it  
19 took less than a day.

20 Q. So, Professor Tracy is not the only faculty member you have  
21 given the advice to comply with the advice of submit an outside  
22 activity report?

23 A. I almost -- I can't think of a situation I haven't told  
24 someone when they say do I need to fill it out -- there is a  
25 saying we have, when in doubt, fill it out.

1 Q. Did you ever tell Professor Tracy that he doesn't have the  
2 right to blog?

3 A. No.

4 Q. Did FAU ever tell Professor Tracy that he didn't have the  
5 right to blog?

6 A. Not that I am aware of.

7 MR. LEO: Objection, calls for speculation.

8 MR. FEICHT: He answered not that I am aware.

9 THE COURT: I will allow the answer to stand.

10 BY MR. FEICHT:

11 Q. Did you or any other union representatives ever tell Dr.  
12 Tracy that he couldn't blog about particular topics?

13 A. Not that I am aware of.

14 Q. Did Professor Tracy receive multiple notices from FAU,  
15 including a Notice of Discipline and later a notice of proposed  
16 discipline, termination to comply with the directive to fill  
17 out reports of outside activity?

18 A. Yes.

19 MR. LEO: Objection, calls for speculation.

20 THE COURT: Well, if the witness has knowledge of it,  
21 he may answer.

22 BY MR. FEICHT:

23 Q. Did you see the Notice of Discipline and Notice of  
24 Termination and emails exchanged with the administration?

25 A. Yes.

1 Q. Did Dr. Tracy receive multiple opportunities to comply with  
2 the directive to fill out the reports of outside activity?

3 A. Yes.

4 Q. Can you please publish Defendant's 45 we were looking at  
5 earlier in evidence, and blow up Dr. Zoeller's email to  
6 Professor Tracy.

7 Despite those notices from the university and despite your  
8 advice to him as the president of the faculty union, did  
9 Professor Tracy comply with the directive to sign the outside  
10 activity reports?

11 A. Could you repeat the question?

12 Q. Sure. Despite multiple notices from the university and the  
13 union's advice to sign now and fight after, did Professor Tracy  
14 submit complete outside activity forms?

15 A. He eventually submitted some forms, but it was after the  
16 deadline that they had given him, and while -- so it was after  
17 the deadline, and if I remember correctly, it didn't have  
18 the -- he didn't report the blog.

19 Q. Did he report his compensation earned through the blog?

20 A. I don't believe so, no.

21 Q. Did he report his use of university resources regarding the  
22 blog?

23 A. Not -- I don't believe so on those forms.

24 Q. The forms didn't mention the memoryhole blog at all, did  
25 they?



1 A. I don't believe so, no.

2 Q. Did he report the book, Nobody Died at Sandy Hook, it was a  
3 FEMA drill on gun control?

4 A. I don't believe so, no.

5 Q. Was Professor Tracy fired for insubordination?

6 A. Yes.

7 MR. FEICHT: No further questions.

8 THE COURT: Any cross-examination?

9 MR. LEO: Absolutely, your Honor.

10 **CROSS-EXAMINATION**

11 BY MR. LEO:

12 Q. I'm going to show you what is marked Plaintiff's 74 for  
13 identification.

14 THE COURT: What is this?

15 MR. LEO: 74, your Honor.

16 THE COURT: Plaintiff's 74?

17 MR. FEICHT: No objection to the admission of 74.

18 MR. LEO: May we publish?

19 THE COURT: Are you moving it in?

20 MR. LEO: Yes, your Honor.

21 THE COURT: Plaintiff's 74 admitted without objection.

22 (Whereupon Plaintiff Exhibit 74 was marked for evidence.)

23 BY MR. LEO:

24 Q. You were copied on this communication; isn't that right,  
25 Dr. Zoeller?

1 A. I am still reading, give me a second.

2 Q. Take your time.

3 A. The question again.

4 Q. You were included on the communication?

5 A. Yes.

6 Q. That is you, Robert Zoeller, President of UFF at FAU?

7 A. Yes.

8 Q. The date is December 2015?

9 A. Yes.

10 Q. The union retained Thomas Johnson on December 18th?

11 A. Yes.

12 Q. A moment ago, you testified that Thomas Johnson told you  
13 on, I believe, December 20th that he had a weak case?

14 A. We had a teleconference on or about that time, yes.

15 Q. Okay. So, Thomas Johnson was representing Professor Tracy  
16 for two days and he is telling you Professor Tracy had a weak  
17 case?

18 A. That is what he said.

19 Q. Do you know if Thomas Johnson met Professor Tracy at that  
20 time?

21 A. I don't know. No, I don't know.

22 Q. Publish 2-A, go to page four.

23 Do you know if Thomas Johnson had these notes -- scroll  
24 down .

25 Do you know if Thomas Johnson, on December 20, 2015, had

1 these notes that you are looking at on the monitor?

2 A. I don't know what Thomas Johnson did or did not have. I  
3 can only tell you what he stated.

4 Q. Did you have these notes that you are looking at on the  
5 monitor on December 20, 2015?

6 A. No.

7 Q. Did you have them in November of 2015, when you told  
8 Professor Tracy that the Notice of Discipline on November 10,  
9 2015 was not grievable?

10 A. No, I did not.

11 Q. Do you know whose notes these are?

12 A. I have no idea.

13 Q. If you learned that they were Dean Coltman's notes recorded  
14 in 2013, would that have changed your opinion about whether or  
15 not Professor Tracy's Notice of Discipline was grievable or  
16 not?

17 MR. FEICHT: Objection, lack of foundation, calls for  
18 speculation.

19 THE COURT: He didn't have the notes. There is a way  
20 you can reframe the question without referencing notes that he  
21 didn't have, didn't know about -- what is the question you want  
22 to ask the witness?

23 MR. LEO: Opposing counsel explored at length this  
24 individual's opinion --

25 THE COURT: What question do you want to ask the

1 witness?

2 MR. LEO: I want to know, if this witness had seen the  
3 notes recorded by Dean Coltman in 2013, would that have  
4 affected his opinion in 2015.

5 MR. FEICHT: Your Honor, this requires a sidebar as  
6 far as asking a witness about something he had never seen that  
7 occurred two years prior.

8 THE COURT: You can ask the witness the question  
9 without referring to the document he didn't know anything  
10 about.

11 Just ask him the question.

12 BY MR. LEO:

13 Q. If you knew that Dean Coltman was recording notes, First  
14 Amendment, find winning metaphors, would you have advised  
15 Professor Tracy in 2015 that his position was not grievable?

16 MR. FEICHT: Objection, calls for speculation.

17 MR. LEO: I can rephrase.

18 THE COURT: Simplify without trying to, you know,  
19 characterize one way or the other the document or another  
20 witness' testimony. You can ask another question of the  
21 witness.

22 MR. LEO: Go back to 74.

23 BY MR. LEO:

24 Q. It says here, "We will work on a response for you in time  
25 to meet your ten-day deadline." That is what Mr. Moats wrote

1 to Professor Tracy on November 17th?

2 A. Yes.

3 Q. Did you work on a response?

4 A. Did I work on a response? No.

5 Q. He is saying "we", is he referring to the union?

6 A. I don't know who he is referring to.

7 Q. Do you know if anybody worked for Professor Tracy at that  
8 time?

9 A. Yes, Michael Moats.

10 Q. You know that nothing was filed?

11 A. Yes.

12 Q. There are a lot of mantras flying around. We can do  
13 together what you can't do alone, is that the union's mantra?

14 A. I believe so.

15 Q. Did the union do for Professor Tracy what he couldn't do  
16 alone?

17 *MR. FEICHT:* Objection, vague.

18 *THE COURT:* Overruled. The witness can answer if he  
19 can.

20 *THE WITNESS:* I don't understand the question.

21 *BY MR. LEO:*

22 Q. Okay, in 2015, you testified you were aware of the  
23 Plaintiff's blog?

24 A. Sorry?

25 Q. You were aware of the Plaintiff's blog in 2015?

1 A. Yes.

2 Q. You were aware he was blogging about Sandy Hook?

3 A. Yes.

4 Q. You were aware he was blogging about other conspiracy  
5 theories?

6 A. Yes.

7 Q. On his own time?

8 A. I believe so, yes.

9 Q. You knew about it?

10 A. I was aware of it, yes.

11 Q. When you were president of the union?

12 A. Yes.

13 Q. You didn't like it, did you?

14 A. I saw -- to say I didn't like it, I would say that I saw it  
15 as -- I tried to ignore all that stuff, blogging, conspiracy  
16 theories and et cetera. Do I like it? I just --

17 Q. You weren't able to ignore Professor Tracy's blog, were  
18 you?

19 A. I don't understand the question.

20 Q. In 2015, you didn't ignore it?

21 A. I don't understand the question.

22 Q. You didn't ignore his blog when it came to representing him  
23 for the union, right?

24 MR. FEICHT: Objection, vague.

25 THE COURT: I think the witness said he doesn't

1 understand what you mean by you didn't ignore his blogs.

2 Reword that part of the question.

3 *BY MR. LEO:*

4 Q. When you were representing Professor Tracy in 2015, on  
5 behalf of the union, did you ignore Professor Tracy's blog?

6 *MR. FEICHT:* Objection, vague.

7 *THE WITNESS:* I can't answer a question I don't  
8 understand.

9 *BY MR. LEO:*

10 Q. When you were president of the union in November 2015, you  
11 knew about his blog, right?

12 A. Yes.

13 Q. Did you ignore the blog when you decided Professor Tracy's  
14 Notice of Discipline was not grievable?

15 A. I don't understand -- it is too vague for me to answer.

16 Q. Is it?

17 A. Yes.

18 *THE COURT:* What do you mean by "did you ignore the  
19 blog?" That is where the witness is having trouble. Don't use  
20 ignore anymore, come up with a different word.

21 *BY MR. LEO:*

22 Q. Is it your understanding that you did not take Professor  
23 Tracy's blog into consideration when you were advising him that  
24 his Notice of Discipline was not grievable?

25 A. It is too vague -- what does that mean to you, take into

1 consideration?

2 Q. Do you understand English?

3 MR. FEICHT: Objection, do you understand English,  
4 vague, your Honor.

5 THE COURT: Sustained. It does not call for side  
6 comments. Please ask the question.

7 THE WITNESS: Thank you, your Honor.

8 THE COURT: The shorter the question, often times the  
9 better. Try to keep them short.

10 BY MR. LEO:

11 Q. You testified you tried to ignore it, Professor Tracy's  
12 blog, right?

13 A. I don't think I said exactly that, no.

14 Q. In 2015, did you ignore Professor Tracy's blog or didn't  
15 you?

16 MR. FEICHT: Objection, vague.

17 THE COURT: I will sustain the objection. I am not  
18 preventing you from asking questions, but I am going to require  
19 that you phrase questions in a way that the witness is able to  
20 answer them. However difficult that may be for you to phrase  
21 it that way, you must try.

22 BY MR. LEO:

23 Q. Isn't it true you told Professor Tracy his Notice of  
24 Discipline was not grievable because you did not like him or  
25 his blog?



1 A. That is a lie, sir.

2 Q. As you sit here today, is it your testimony that you like  
3 Professor Tracy?

4 A. I didn't say that.

5 Q. You don't like him, right?

6 A. No, I did not tell him that I did not file the grievance  
7 because I didn't like him.

8 Q. Okay. You didn't tell him that, but that is what you did,  
9 right?

10 MR. FEICHT: Objection, vague.

11 THE WITNESS: I will say no, that is a lie.

12 THE COURT: Wait a minute. There is an objection.

13 I'll overrule the objection. Now you can answer.

14 THE WITNESS: That is not right, sir.

15 BY MR. LEO:

16 Q. You weren't in Professor Tracy's discipline?

17 A. No, I was not.

18 Q. You weren't a faculty member in Professor Tracy's college?

19 A. No.

20 Q. You met with him once face-to-face in 2015; isn't that  
21 right?

22 A. That sounds right.

23 Q. Okay. When you had a meeting to discuss Professor Tracy's  
24 Notice of Discipline, you didn't include Professor Tracy's  
25 presence in the meeting, did you?

1 A. No, nor was I required to.

2 Q. Pull up Defense Exhibit 48 in evidence.

3 You wrote on Tuesday, December 1st, "Jim, we met with  
4 Michael Moats yesterday and discussed your situation at  
5 length."

6 You didn't think that Professor Tracy should have been a  
7 part of that discussion?

8 A. No, sir.

9 Q. Wasn't that his right?

10 A. No, sir.

11 Q. Why?

12 A. Show me where it is -- show me where it is stated it is his  
13 right.

14 Q. You are the union president?

15 A. I am sorry?

16 Q. You didn't think he could participate in that discussion?

17 A. I think it would not have been appropriate, no.

18 Q. It wouldn't be appropriate to have a dues paying member  
19 participate in a discussion about his rights under the  
20 collective bargaining agreement?

21 A. That is typically -- we almost never have the individual --  
22 this is a discussion of the collective bargaining -- not the  
23 collective bargaining, of the grievance committee to determine  
24 our stand as far as whether there is a violation of the  
25 collective bargaining agreement.

1           MR. LEO: Your Honor, if I could publish 12.

2           THE COURT: Pull the microphone closer to make sure we  
3 get everything.

4           THE WITNESS: I'm sorry.

5 BY MR. LEO:

6 Q. A moment ago, you testified that outside activities are  
7 reportable when they are in the discipline, right?

8           Can you tell us -- actually, let me rephrase that. Article  
9 19 doesn't say anything like that, does it? It doesn't say  
10 that --

11 A. It says professional practice.

12 Q. Where does it say that if it is in your discipline or if it  
13 is --

14 A. Your discipline and profession I am pretty sure is the same  
15 thing.

16 Q. I didn't see the words closely aligned in here either.  
17 Would you agree there is nothing about your activity being  
18 closely aligned that it has to be reported in Article 19?

19 A. It says professional practice.

20 Q. Right.

21 A. Which is the application of your professional training.

22 Q. That is your interpretation of this, isn't it?

23 A. Yes, sir.

24 Q. Would you agree that everybody at that university has a  
25 different interpretation of this definition?

1 A. I can't speak to what other people think.

2 Q. You are the president of the union, right, or you were?

3 A. Yes.

4 Q. Would you agree faculty members at that university while  
5 you were president of the union, they were confused about this  
6 policy?

7 MR. FEICHT: Objection, lack of foundation, personal  
8 acknowledge as to other people's state of mind.

9 THE COURT: Sustained.

10 BY MR. LEO:

11 Q. As president of the union, did you ever receive complaints  
12 or any confusion that was expressed to you as president of the  
13 union about this policy?

14 MR. FEICHT: Same objection, your Honor. And there is  
15 also a prior ruling on this issue, or getting close. It also  
16 calls for hearsay to the extent he is asking what other people  
17 told him to establish personal knowledge.

18 THE COURT: Sustained. You can rephrase.

19 BY MR. LEO:

20 Q. Let's do this, go to Defense Exhibit 45.

21 Professor Tracy told you he was confused, didn't he?

22 A. Uh-hum.

23 THE COURT: You have to --

24 THE WITNESS: Yes.

25

1 BY MR. LEO:

2 Q. You wrote you -- go back to the middle there, I apologize.

3 You said there is still confusion concerning faculty speech  
4 activities, right?

5 A. Yes, but Article 5 is not -- that is Article 5. The  
6 outside activity form is Article 19.

7 Q. Right, but he is talking about the university's policies'  
8 language, right? In the CBA, it says more straight forward.

9 He is talking about more than just the CBA, right?

10 A. In his view, yes.

11 Q. You would agree that conflict of interest is more than the  
12 CBA, more than just Article 19, right?

13 A. The CBA supersedes any policy at the university.

14 MR. LEO: 23, your Honor, I am going to publish, it is  
15 already in.

16 BY MR. LEO:

17 Q. Does the collective bargaining agreement, if you know,  
18 supersede Chapter 112 of the Florida Statutes?

19 MR. FEICHT: Objection, calls for a legal conclusion.

20 THE COURT: I'll sustain.

21 BY MR. LEO:

22 Q. Do you recognize this document?

23 MR. FEICHT: Outside the scope of direct, your Honor.  
24 I didn't address anything once after Professor Tracy's  
25 termination.

1           MR. LEO: Might I respond?

2           THE COURT: Yes.

3           MR. LEO: The entire scope of direct was about this  
4 policy and how Professor Tracy violated it. Now he doesn't  
5 want me to ask about the policy.

6           THE COURT: I will overrule the objection.

7 BY MR. LEO:

8 Q. Did you receive this?

9 A. I am aware of it.

10 Q. This came after Professor Tracy was fired, right?

11 A. Yes.

12 Q. Let's go down to the very bottom.

13 You would agree documents referenced in this memorandum  
14 from the Provost, these are documents, forms, regulations that  
15 encompass this conflict of interest policy at the university,  
16 right?

17 A. Can you scroll up to the top, please.

18 Q. Here, let me give you a hard copy.

19 A. Okay. So, it is not a policy, it is a memorandum, but do  
20 these documents in D, the bottom of this page, are they -- ask  
21 the question again.

22 Q. My question is about this policy and if the documents that  
23 are referenced in this memorandum that was sent to faculty  
24 after Professor Tracy was fired, are all of these documents a  
25 part of the university's conflict of interest policy if you

1 know?

2 A. First of all, it is not a policy, these are references.

3 Q. Are you familiar with these documents listed in here,  
4 regulations?

5 A. I am familiar with some of them, yes.

6 Q. You said the CBA supersedes the school policy, right?

7 A. Well, a policy cannot be -- if a policy contradiction --  
8 poor choice of words. If the policy is in conflict with the  
9 collective bargaining agreement, it is -- Article 1 says the  
10 collective bargaining agreement shall prevail.

11 Q. If a university creates a document, for example, an outside  
12 activity form like this, that would be a problem, right?

13 A. No.

14 Q. You said that the policy -- CBA supersedes anything else?

15 A. This has been -- this document has been present at the  
16 university for many years, including the time President Tracy  
17 signed off on this.

18 Q. Okay, but you agree this form is not in the CBA?

19 A. There are lots of documents not part of the CBA  
20 specifically.

21 Q. Right. And nothing in the CBA says any faculty member has  
22 to turn in this form, reported outside employment or  
23 professional activity for FAU employees, right?

24 A. It says you must report outside activity, and this is the  
25 form the university uses.

1 Q. It says reportable outside activity, right?

2 A. Uh-hum.

3 Q. Not all outside activity?

4 A. Right.

5 Q. The union doesn't provide training for faculty members at  
6 Florida Atlantic University on compliance with this policy; is  
7 that true?

8 A. That is true.

9 Q. The union does not sit down with faculty members and  
10 explain how to fill out a professional outside activity form;  
11 isn't that true?

12 A. I have helped people do it, yes.

13 Q. You didn't help Professor Tracy?

14 A. He didn't ask me to.

15 Q. You didn't ask him if he wanted you to?

16 A. It goes both ways.

17 Q. You said non-grievable. Didn't you?

18 A. I didn't say just that, I said in an email it is not  
19 grievable, yes.

20 Q. Let's go back to 45.

21 Professor Tracy was writing you because of the check box,  
22 right?

23 A. Yes.

24 Q. And you wrote back "I think this is something new, I don't  
25 remember signing it this time either"?



1 A. Okay.

2 Q. You wrote that, right?

3 A. Yes.

4 Q. That is because the check box was new at the time?

5 A. I believe so. As I said, I don't recall. But I believe, I  
6 believe -- it was either 2014 or 15, that first appeared, yes.

7 Q. And when he brought to your attention that something new  
8 had been implemented that was not part of the collective  
9 bargaining agreement, you didn't file a grievance at that time,  
10 did you?

11 MR. FEICHT: Objection, lack of foundation,  
12 mischaracterizes the witness' testimony. He just said it could  
13 have been 2014 or 2015.

14 THE COURT: Sustained. Rephrase.

15 BY MR. LEO:

16 Q. My question is more towards what you did when you had the  
17 email exchange.

18 You didn't file a grievance against the check box, right?

19 A. No, I didn't.

20 Q. Not grievable?

21 A. I don't see a violation of the collective bargaining  
22 agreement, no. I'm not looking for a boogie man under my bed,  
23 either.

24 Q. In December 2015 -- let's do this.

25 Let me show you what is marked as Plaintiff's 79 for

1 identification.

2 MR. LEO: Any objection to moving this one in?

3 MR. FEICHT: Give me a second to review, please. We  
4 object on hearsay grounds on this one, your Honor.

5 MR. LEO: May I lay a foundation, your Honor?

6 MR. FEICHT: Also outside the scope.

7 MR. LEO: It is a business record, your Honor.

8 THE COURT: This is outside the scope, this was not  
9 discussed on direct examination.

10 MR. LEO: The witness testified at length what  
11 happened in December 2015 with respect to his involvement and  
12 Mr. Moats' involvement. This is a communication between them  
13 concerning Professor Tracy's --

14 MR. FEICHT: Please don't reference what is inside the  
15 document.

16 THE COURT: You can see if you can lay a foundation.

17 MR. FEICHT: We object based on outside the scope, we  
18 didn't discuss anything about this topic.

19 THE COURT: Right.

20 BY MR. LEO:

21 Q. Dr. Zoeller, your union is an organization?

22 A. Yes.

23 Q. When you send and receive emails between Michael Moats,  
24 that is during the course of your regularly conducted activity  
25 as an organization, right?

1 A. Yes.

2 Q. And this email right here that we are referring to,  
3 Plaintiff's 79 --

4 A. Yes.

5 Q. -- this is a communication between Michael Moats and  
6 yourself in your capacity as a union official, right?

7 A. I'm sorry, I am trying to read this and listen to you at  
8 the same time.

9 Q. Read it and when you are finished, look at me and let me  
10 know.

11 A. Okay.

12 Q. When you were communicating with Michael Moats, this is in  
13 the course of the regular conducted activity of your  
14 organization, United Faculty of Florida FAU, right?

15 A. Yes.

16 Q. And this email dated 12/15/2015, was made at or near the  
17 time this information was transmitted; isn't that right?

18 A. I'm sorry, I didn't hear you.

19 Q. This email was sent on the date it is noted?

20 A. Yes.

21 Q. And communicating with Michael Moats about union matters  
22 like this was a regular practice of your organization, right?

23 A. Yes.

24 MR. LEO: Your Honor, at this time we move Plaintiff's  
25 79 into evidence.

1           MR. FEICHT: Same objection, hearsay. They have not  
2 sufficiently established that it is a business record as well  
3 as remains outside the scope of direct examination.

4           THE COURT: Sustained on both grounds. I will have it  
5 marked for ID only.

6 BY MR. LEO:

7 Q. Matters that were discussed in this email occurred at the  
8 time that they were transmitted, right?

9 A. I believe so, yes.

10           MR. LEO: Your Honor, now I would like to move this  
11 into evidence as Plaintiff's 79.

12           THE COURT: I sustain.

13 BY MR. LEO:

14 Q. You did not let Professor Tracy respond to the notice of  
15 proposed discipline; is that right?

16 A. I'm sorry, I didn't hear you.

17 Q. The union, United Faculty of Florida, did not let Professor  
18 Tracy respond to the notice of proposed termination; isn't that  
19 right?

20 A. No.

21 Q. A moment ago you testified that the Notice of Discipline,  
22 December -- I'm sorry, November 10, 2015, was not grievable,  
23 right?

24 A. Yes. Not winable.

25 Q. I am saying not grievable. Those was your words, right?

1 A. Yes.

2 Q. Isn't it true anything is grievable?

3 A. You can grieve anything, but you don't.

4 Q. What do you mean?

5 A. I could grieve that I -- that my lunch was cold today.

6 Yes, I think I am very clear, you could grieve anything, but  
7 you don't. You grieve a violation of the collective bargaining  
8 agreement.

9 Q. You can grieve anything, right?

10 So, you could have grieved the November 10 Notice of  
11 Discipline, right?

12 MR. FEICHT: Objection, cumulative.

13 THE COURT: Overruled.

14 THE WITNESS: Yes, you can grieve anything, but you  
15 don't.

16 BY MR. LEO:

17 Q. Right. And you told Professor Tracy -- you told Professor  
18 Tracy your situation is not grievable?

19 A. Right, not winable, it is not a violation of the collective  
20 bargaining agreement.

21 Q. You did not say not winable in this email, did you?

22 A. No. I did not use those specific words.

23 Q. Is it your testimony that Professor Tracy should have filed  
24 a grievance after you advised him that he couldn't?

25 A. No, that is a misstatement of fact.

1 Q. Isn't it true you learned after this that your advisement  
2 of not grievable was wrong advice?

3 A. I was told by Dr. Lenz at some time much later that that  
4 was not the best word, so I admit to that. I was a rookie  
5 relatively speaking.

6 Q. You were a rookie. Would you agree you gave Professor  
7 Tracy bad advice?

8 A. No.

9 Q. No? You think this is good advice?

10 A. That is not advice, that was a decision.

11 Q. Decision by the union that Professor Tracy can't grieve,  
12 right?

13 A. That is not what we stated. I am not telling him he could  
14 not grieve.

15 Q. Really?

16 A. Yes, really.

17 Q. And nobody told Professor Tracy what you just said, right,  
18 that you were wrong?

19 MR. FEICHT: Objection, mischaracterizes the witness'  
20 testimony.

21 THE COURT: Sustained.

22 BY MR. LEO:

23 Q. You didn't tell Professor Tracy after you sent this email,  
24 I was wrong, it is grievable, did you?

25 A. No, I did not.

1 Q. Don't you think telling someone it's not grievable could  
2 affect their decision?

3 A. Not when it is the past president of the union who is  
4 involved in the process and knows he can file the grievance and  
5 I do not have the authority to instruct him not to file a  
6 grievance. As past president of the union, he would know that.

7 Q. And you were the president of the union at this time,  
8 December 1st, 2015; isn't that true?

9 A. Yes.

10 Q. And you were wrong about grievability, weren't you?

11 A. No, I was not.

12 MR. LEO: Okay. That is all I have.

13 THE COURT: Okay. Is there any redirect examination?

14 MR. FEICHT: Yes, your Honor.

15 Can I publish Defendant's Exhibit 28, which is already  
16 in evidence, your Honor.

17 **REDIRECT EXAMINATION**

18 BY MR. FEICHT:

19 Q. I am sorry, this is the wrong one. We can look while I am  
20 getting the other one, at 28, last page. Blow up that last  
21 paragraph and highlight the last sentence.

22 Did FAU tell Dr. Tracy that his notice of disciplinary  
23 action, termination is subject to CBA Article 29, grievance  
24 procedure?

25 MR. LEO: Objection, lack of foundation.

1           THE COURT: Overruled.

2           THE WITNESS: Yes.

3       BY MR. FEICHT:

4       Q. So he could file a grievance, right?

5       A. Yes.

6           MR. FEICHT: Defendant's Exhibit 29, please, already  
7 in evidence, last page. Last sentence --

8           MR. LEO: Objection, cumulative.

9           MR. FEICHT: This is a different letter.

10          THE COURT: Overruled.

11       BY MR. FEICHT:

12       Q. The other notice of proposed discipline, termination, did  
13 it also advise Professor Tracy that the proposed disciplinary  
14 action is subject to the grievance procedures of the CBA?

15       A. Yes.

16       Q. Put up Plaintiff's 74, please.

17           You were shown this on direct, you were not shown the last  
18 page. Go to the last page, blow up that email.

19           Did Michael Moats tell Professor Tracy that he knew that  
20 the university is not terminating him over free speech issues?

21       A. Yes.

22       Q. And did Michael Moats also tell Dr. Tracy that your refusal  
23 to properly complete required documents gave them another  
24 likely valid reason to terminate?

25       A. Yes.



1 Q. Plaintiff's 23, please -- go to Plaintiff's 25 --  
2 Defendant's 25, sorry.

3 I showed you the two notices of proposed discipline,  
4 termination. This is the Notice of Discipline from November,  
5 right?

6 A. Yes.

7 Q. Let's go to the last page, let's see what FAU told him.

8 Did they tell him in November the initial Notice of  
9 Discipline was subject to Article 20 of the CBA?

10 MR. LEO: Objection, calls for speculation,  
11 cumulative.

12 THE COURT: Overruled.

13 THE WITNESS: Yes.

14 BY MR. FEICHT:

15 Q. What is Article 20?

16 A. Article 20 is the grievance procedure.

17 Q. Okay. Thank you. Now let's go to Plaintiff's 23. Let's  
18 blow up this bottom paragraph, please. You were shown this on  
19 direct.

20 The FAU memorandum that they showed you on direct, if in  
21 doubt, reporting is the best practice, right?

22 A. Yes.

23 Q. Did you tell faculty that you advise, as president of UFF  
24 FAU regarding the outside activity form, if in doubt, fill it  
25 out?

1 A. Yes.

2 MR. FEICHT: No more questions, your Honor, thank you.

3 MR. LEO: Your Honor, short followup.

4 THE COURT: Well, we had direct, cross, redirect, that  
5 ends it.

6 Okay, thank you very much. You may step down.

7 We will take our mid-afternoon break at this point,  
8 ladies and gentlemen. 15 minutes, so we will be coming back a  
9 little after 3:30, with a reminder not to discuss the case, not  
10 to do any media, do any research about the case, and do not  
11 discuss the case with anybody. Thank you.

12 *(Thereupon, the jury leaves the courtroom.)*

13 THE COURT: All right. Quickly, a couple more  
14 minutes, let me address a couple of the Johnson issues. That  
15 is your next witness?

16 MR. FEICHT: Yes, your Honor.

17 THE COURT: Let me first address the portion that I  
18 think I deferred on. It had to do with, I think, page 79,  
19 lines seven to nine, and 13 to 22, and I am going to exclude  
20 this portion, so I know that that was what we left off with.

21 In this part of the deposition Mr. Johnson is being  
22 asked about an email that I had already ruled was excluded. My  
23 prior ruling stands and the deposition designation that is  
24 sought to be admitted is only about Johnson's knowledge from  
25 the January 7th email that Dr. Tracy sent, which I did exclude,

1 and it just seems that, consistent with that ruling, that  
2 should -- whoever objected -- the Plaintiff objected. That  
3 objection would be sustained and that would not come in.

4 MR. FEICHT: Could I get the page and line numbers one  
5 more time?

6 THE COURT: Page 69, lines seven to nine, 13 to 15 and  
7 16 to 22. So those don't come in consistent with my prior  
8 ruling on 216-A.

9 And with respect to others that you brought to my  
10 attention before we broke, let's see here, so there was page  
11 92, line 19 through page 93, line four. That appears to be  
12 addressing whether Dr. Tracy terminated his attorney/client  
13 relationship with Mr. Johnson before he hired a new attorney,  
14 whether there was a gap when Dr. Tracy was not represented.  
15 The Plaintiff objected on relevance and I am going to sustain  
16 that objection.

17 There was page 98, line 12 through 99, line one,  
18 whether FAU is giving a time to -- the Defendant objected on  
19 relevance since it contained the conspiracy allegation. The  
20 relevancy objection seems correct, that would be sustained.

21 That is everything that you brought to my attention  
22 that had not be resolved as to Johnson.

23 MR. FEICHT: Okay, your Honor.

24 THE COURT: So, you will be ready to go with Johnson  
25 when we come back?

1           MR. FEICHT: We have a few more that we ran out of  
2 time on earlier.

3           THE COURT: What page?

4           MR. FEICHT: 101. We designated two through 25, we  
5 are willing to start on line 25, so it would be 101, 25 through  
6 102, 9.

7           THE COURT: You are eliminating everything else?

8           MR. FEICHT: Yes. Trying to resolve this.

9           MR. BENZION: 101, 25.

10          THE COURT: And ends on page 102, line nine.

11          MR. FEICHT: Correct.

12          THE COURT: Okay. From the Plaintiff.

13          MR. BENZION: To 102, nine?

14          MR. FEICHT: Yes.

15          MR. BENZION: And the next one is 102, 11?

16          THE COURT: Everything on 102 is out.

17          MR. FEICHT: 102, 11 is the next designation.

18          MR. BENZION: The conversation keeps going and there  
19 is evidence --

20          THE COURT: I am getting confused. What are we  
21 arguing about now?

22          MR. BENZION: Well --

23          THE COURT: Wait. First take 101, line 25 to 102,  
24 line nine. Any objection to that?

25          MR. BENZION: Completeness.

1           *THE COURT:* Is there something you are offering to  
2 complete that?

3           *MR. BENZION:* The following designation, your Honor.

4           *THE COURT:* That is what Defense wants, 102, line 11  
5 through.

6           *MR. FEICHT:* 103, four.

7           *THE COURT:* Does that address the completeness?

8           *MR. BENZION:* No, there is a speculation issue, the  
9 witness answers and says he doesn't know.

10           *THE COURT:* So, everything was cool, that one, on page  
11 103?

12           *MR. BENZION:* Looking at 102, 11, your Honor.

13           *THE COURT:* We are going to start from the time, 102,  
14 line 25, going back to where there is a discussion of the draft  
15 grievance, okay, "you testified that this grievance did not get  
16 filed."

17           "That's correct.

18           "To your knowledge? My followup question is: Did  
19 Professor Tracy know that the grievance was not being filed?  
20 Did he have knowledge based on discussions with you?

21           "I would think so. I think I discussed the various  
22 ways of going forward. I mean, once they -- they filed their  
23 proposed -- notice of proposed, what you call it, discipline  
24 back in December, like the 18th or something, 15th, 18th, and  
25 then we had ten days to respond. But the ten days to response

1 is a lateral thing where you go and -- well, you shouldn't fire  
2 me because of X -- and goes on, so I said we are just not going  
3 to file a response to this."

4 So, what he is saying is, I think I discussed the  
5 various ways of going forward, and then he explains how he  
6 explained it. I don't see how that is speculative.

7 *MR. BENZION:* Withdraw the objection.

8 *THE COURT:* That is taken care of, objection  
9 withdrawn.

10 What else?

11 *MR. FEICHT:* Any other objections on the next two  
12 pages?

13 *MR. BENZION:* Yes, there are objections. We have not  
14 addressed the objection.

15 *THE COURT:* What page and line?

16 *MR. BENZION:* Yes, your Honor. 104, line 21.

17 *THE COURT:* "Did professor Tracy hire new counsel,  
18 thereby terminating your attorney/client relationship with him  
19 before the expiration of the 30-day deadline to file a  
20 grievance regarding his termination?

21 "My understanding is he hired new counsel before the  
22 end of the 30-day period.

23 "Is that a yes?

24 "That is correct."

25 *MR. BENZION:* Relevance, your Honor.

1           *THE COURT:* Response.

2           *MR. FEICHT:* We have had testimony about whether or  
3 not Professor Tracy had sufficient time to file a grievance,  
4 and the implication, especially on the direct of Mr. Moats and  
5 Mr. Johnson, is that the union somehow failed in that regard  
6 and it shows that Professor Tracy hired a new lawyer with  
7 sufficient time to file a grievance with a new lawyer.

8           *THE COURT:* I just sustained an objection to page 92,  
9 19 to 93, four, regarding the termination of the  
10 attorney/client relationship before he hired a new one, so,  
11 consistent with that ruling, I am going to sustain that  
12 objection.

13           *MR. BENZION:* Next one.

14           *THE COURT:* Are we going page by page? We have a  
15 15-minute break.

16           *MR. BENZION:* We talked about the objection to the  
17 mental health question.

18           *THE COURT:* 107?

19           *MR. BENZION:* 106, 7 through 14 and 107. I have not  
20 heard a response regarding the Defendant's position.

21           *MR. FEICHT:* We withdraw those two, 106 and 107.

22           *THE COURT:* Yes, that would seem like the right thing  
23 to do.

24           What else is not resolved?

25           *MR. BENZION:* There is a hearsay document discussed at

1 139, four.

2 *THE COURT:* What page, 139 --

3 *MR. BENZION:* Page 139, line four. I made the note  
4 before the past witness, I am not sure if this is a document  
5 that came in.

6 *THE COURT:* 217-L, whose is that, Plaintiff's or --

7 *MR. BENZION:* Defense.

8 *THE COURT:* I don't think you have a 217, do you?

9 There is nothing called 217-L -- no, that is  
10 Plaintiff's, hold on.

11 217-J, K, L, it is not in.

12 *MR. BENZION:* It is hearsay, contains discussions of  
13 FAU's lawyer to Dr. Tracy's union lawyer at the time.

14 *THE COURT:* Okay. How can we let it in if we don't  
15 have the document in evidence if it is discussing it?

16 *MR. FEICHT:* Your Honor, there are going to be several  
17 documents if Mr. Johnson authenticates them on the record in  
18 deposition, just like we did with the previous depositions,  
19 that we will be pausing and admitting those into evidence.

20 *THE COURT:* This is from Glick to Johnson concerning  
21 Moats, right? Is it to Johnson? Is this Tom Johnson?

22 *MR. BENZION:* Correct.

23 *THE COURT:* "Tom, can you call me today before  
24 4:00 p.m., and also the meeting -- Article 19.6 required  
25 advance authorization for using university resources he



1 reported" -- and there is an email from Larry to Tom.

2 MR. BENZION: It is two emails from Larry to Tom.

3 Larry is not going to be here to authenticate these  
4 emails. They are emails received by Tom Johnson containing  
5 hearsay statements of Mr. Glick.

6 THE COURT: Is Tom Johnson going to authenticate Larry  
7 Glick's position and the role in which he wrote the email and  
8 all that in this deposition?

9 MR. FEICHT: No, he is not. I was confused about  
10 whether this is a chain back and forth from Larry to Tom. We  
11 will not be seeking to admit 217-L. We'll remove that  
12 corresponding objection on page 139.

13 THE COURT: That is withdrawn, designations are  
14 withdrawn, objections are sustained.

15 MR. BENZION: We have an objection at page 142, line  
16 24, and this is in reference to a prior ruling the Court has  
17 made.

18 THE COURT: "Mr. Johnson, I've handed you a document  
19 that we marked as Defendant's Exhibit 216C as in Charlie. It  
20 is Bates stamped TJ61 through TJ65. Are these emails you sent  
21 or received during your representation of Professor Tracy?"

22 What is the prior ruling?

23 MR. BENZION: 216-C is essentially containing 216-A,  
24 which is the document that contains the free speech language  
25 and 408 language that the Court has previously taken out.

1           *THE COURT:* Okay. Response.

2           *MR. FEICHT:* I'm trying to get that document, your  
3 Honor.

4           My recollection is that in this document we don't  
5 discuss the provisions that were excluded in the deposition.

6           *THE COURT:* Well, it looks like you are trying to ask  
7 him if he had seen it before, the emails sent and received  
8 during your representation, and you say you wanted to  
9 authenticate it.

10           Is that what you want in?

11           *MR. FEICHT:* Yes, 216-C is admitted with the  
12 redactions, we can take those out.

13           *THE COURT:* Okay, 216-C -- well, Defendant's 216-C is  
14 not in. There might be a Plaintiff's version of it that has  
15 been redacted.

16           *MR. BENZION:* No, 216-C --

17           *THE COURT:* Defendant's.

18           *MR. BENZION:* Defendant's 216-A, it is Defendant's  
19 216-A.

20           *THE COURT:* 216-A redacted is in. 216-C is not.  
21 216-A is.

22           *MR. FEICHT:* I think that is fine.

23           *THE COURT:* So you will withdraw those designations?

24           *MR. FEICHT:* Yes.

25           *THE COURT:* Okay, what else?

1           MR. BENZION: The next four after that one, 143, line  
2 13 through 15, 145, 6 to 16, through 146, there is relevancy  
3 objections to those four designations.

4           THE COURT: What do they discuss?

5           MR. BENZION: About terminating the attorney/client  
6 relationship.

7           THE COURT: I think my previous ruling will apply  
8 unless Defense can tell me otherwise. I do not think this is  
9 relevant and getting off track.

10          MR. FEICHT: I am trying to deal with these for the  
11 first time. I have to review those to see if that is truly all  
12 the documents being authenticated. We do intend to admit  
13 documents through Mr. Johnson. The ones regarding termination  
14 of his attorney/client relationship are not intended to be  
15 submitted.

16          THE COURT: Okay.

17          MR. FEICHT: I don't see those in the set of documents  
18 I have here to be admitted.

19          THE COURT: Okay.

20          MR. BENZION: So I am not making any  
21 misrepresentations, one of the emails brought up in those  
22 designations is an email from James regarding threats he was  
23 receiving in January 2016, and harassment he was experiencing  
24 in January 2016.

25          So, I do want to point that out, that is part of that

1 designation.

2 *THE COURT:* Can we resolve that one?

3 *MR. BENZION:* We'll work on that one.

4 *THE COURT:* Are you down to one or two? This is the  
5 next and last witness. We will take a brief break. Before I  
6 get off the bench I want to make sure everything -- everyone  
7 understands what the Court's rulings are.

8 Is there any new issue that is encompassed in any of  
9 the designations that you need a ruling on?

10 *MR. BENZION:* Last page, I have one objection, maybe  
11 we could turn to that one.

12 *THE COURT:* What page is that?

13 *MR. BENZION:* Page 19.

14 *THE COURT:* Page 19?

15 *MR. BENZION:* Page 169.

16 *THE COURT:* Yes, I noted 169, that is about conspiracy  
17 stuff. I don't see where any of that should come in.

18 I don't know who designated -- Plaintiff designated  
19 some stuff and Defendant, conspiracy is out. Any reason why  
20 any of 169 should be in?

21 *MR. FEICHT:* No, we are withdrawing that as well.

22 The one that does need the Court's attention is page  
23 151.

24 *THE COURT:* So we are clear, then, 169, that all comes  
25 out, Plaintiff's and Defendant's.

1           MR. FEICHT: Correct.

2           THE COURT: What page did you want the Court to look  
3 to?

4           MR. FEICHT: 151, please.

5           THE COURT: 151, 151.

6           MR. FEICHT: Plaintiffs have counter designated 151,  
7 19, not including the objection, but through 152, two, it looks  
8 like.

9           THE COURT: "Question: And is Bob Zoeller's  
10 suggestion that in his experience, signing now and fighting  
11 afterwards is the better approach, is that reasonable advice?"  
12 There is an objection, and he says "based on your experience."

13           "It depends on the situation. Most times, yes, but it  
14 depends on the situation. When you are talking about" -- it  
15 just goes up to line two on 152?

16           MR. FEICHT: I believe that is the counter  
17 designation. I was told two, but it makes sense through three,  
18 the counter designation that was filed, and goes through three.

19           THE COURT: "When you are talking about a free speech,  
20 a lot that stuff goes right out the window." Plaintiff wants  
21 that and Defendant is objecting?

22           MR. FEICHT: Correct. It is asking Mr. Johnson for  
23 Mr. Zoeller's understanding and, again, Mr. Johnson is  
24 providing his subjective opinion. "When you are talking about  
25 free speech, a lot of that stuff goes out the window," that is

1       unfairly prejudicial.

2               *MR. BENZION:* May I respond?

3               *THE COURT:* Yes.

4               *MR. BENZION:* He is saying, is this good advice?

5       Well, sometimes, but in a free speech context it might be. It  
6       is only fair that the jury hears this as the Defendant parades  
7       in front of the jury the comply and grieve advice.

8               *THE COURT:* You can have it up to line two, where it  
9       says "it depends on the situation," period, and end there. You  
10      can't bring in the second part of that.

11              The next sentence, that is getting into, you know, you  
12      have a lawyer's deposition being read and opining about perhaps  
13      the very legal issue that is before the jury. That would seem  
14      inappropriate.

15              *MR. BENZION:* Can I proffer something on the record on  
16      that?

17              *THE COURT:* Uh-hum.

18              *MR. BENZION:* During Mr. Moats' testimony he would say  
19      I would not characterize this as a free speech issue,  
20      termination is likely valid, a good case regarding  
21      insubordination.

22              Opinions have been rendered regarding the free speech  
23      issues in this case.

24              *THE COURT:* Moats is a university union person whose  
25      job it is in that context to assess -- I don't recall exactly

1 what he said, but I view that very differently than an attorney  
2 being presented in court with a legal opinion. Mr. Moats is  
3 not an attorney.

4 So, I understand maybe certain persons have given  
5 certain opinions, but that doesn't mean every person can give  
6 an opinion. This is distinct. I will let you get it in up  
7 until that sentence that ends with "but it depends on the  
8 situation," period.

9 Is there anything else you haven't resolved or can't  
10 resolve?

11 MR. FEICHT: Any other counter designations?

12 MR. BENZION: There are. We haven't had an  
13 opportunity to discuss them yet.

14 THE COURT: Discuss them. You are doing yours by  
15 video?

16 MR. FEICHT: Part by video, and there is a corruption  
17 file, and that will be read.

18 THE COURT: What was the date of the video?

19 MR. FEICHT: October 11, '17. An hour, maybe more  
20 than an hour.

21 THE COURT: Let's take a quick break and come back.  
22 We want to the try to finish this up and have a little bit of  
23 time for some of these other matters.

24 *(Thereupon, a short recess was taken.)*

25 MR. FEICHT: Your Honor, based on your rulings, we are

1 substantially narrowing our designations for Mr. Johnson only  
2 to page 13, line seven through 14, line 11, and 14, 20 through  
3 15, five.

4 So it -- and we are going to -- those are a portion  
5 that authenticate Defendant's Exhibit 217-A, and so we would  
6 like to address that. There is an objection to that document,  
7 we would like to address that before the jury comes in if that  
8 comes in based on that testimony. We want to read those two  
9 short designations, put in 217-A, and given the rulings, we'll  
10 withdraw the remainder of the designations from Mr. Johnson.

11 *THE COURT:* 217-A is a document from Moats to Johnson.

12 *MR. FEICHT:* Correct, the day Johnson was hired as Dr.  
13 Tracy's attorney.

14 *THE COURT:* Okay.

15 *MR. FEICHT:* That was authenticated on pages 13 and  
16 14, and we will be done with this witness. If you want to  
17 address any exhibit beforehand so we can read that smoothly and  
18 publish it to the jury, then we will be done with this witness.

19 *THE COURT:* All right. Any objection?

20 *MR. FEICHT:* It is already in, it looks like. Maybe  
21 not. Collective bargaining agreement, settlement agreement. I  
22 am referring to some of the attachments. It looks like it is  
23 in. We want the email, pages one and two.

24 *THE COURT:* All right. Okay, any objection?

25 *MR. BENZION:* We object to Mr. Moats' email, it is



1       hearsay.

2               *THE COURT:* Response.

3               *MR. FEICHT:* It is not being offered for the truth of  
4 the matter asserted, it is being offered to provide the issue  
5 of notice. This is to Dr. Tracy's attorney, this is providing  
6 notice to what his then client's initial reaction was, and  
7 showing he received certain documents and the information being  
8 transmitted by the union to Professor Tracy's attorney who is  
9 acting as an agent.

10              It is not being offered for the truth, and we think it  
11 can be subject to a limiting instruction -- it is not hearsay,  
12 so it doesn't need to be. It is Michael Moats notifying  
13 Plaintiff through his attorney following the --

14              *THE COURT:* I will give the same instruction as  
15 relates to certain documents, and let the jury know it is not  
16 coming in for the truth of the matter, and let counsel inform  
17 the Court when that instruction is appropriate.

18              *MR. BENZION:* The declarant in the email says this is  
19 not a matter about academic freedom and free speech. This is  
20 prejudicial to us. This is why we are in the courtroom, it  
21 invades the province of the jury as well. That is why they  
22 want it in, they want that to be read as if it is true. This  
23 is in fact not about free speech.

24              *MR. FEICHT:* The response is, we are providing it to  
25 show what Dr. Tracy's reaction was and what his union's

1 response to that was, not for the truth of the matter asserted.  
2 It goes to Dr. Tracy's state of mind and shows that Dr. Tracy  
3 was on notice of this information through his own lawyer.

4 It's not being offered for the truth.

5 *THE COURT:* Well, I think Moats has already testified,  
6 he has testified through his deposition.

7 If it is about notice -- attached are the CBA and  
8 several documents that may help with background that shows what  
9 was given to Johnson. I would assume that is not  
10 objectionable, correct?

11 *MR. BENZION:* The documents are not objectionable that  
12 were attached, your Honor.

13 *THE COURT:* Attached are the CBA and several  
14 documents, that portion of the email?

15 *MR. BENZION:* Correct.

16 *THE COURT:* The first sentence, "His initial reaction  
17 was to tell me he thought tenure protected him and allowed him  
18 to say whatever he wanted," that is his statement.

19 *MR. BENZION:* Made by another person, made by Michael  
20 Moats, hearsay within hearsay. The first one is not because it  
21 is Jim's -- Michael's.

22 *MR. FEICHT:* It is providing notice to Dr. Tracy's  
23 attorney of Dr. Tracy's reaction.

24 *THE COURT:* Why is that relevant?

25 *MR. FEICHT:* So Dr. Tracy's attorney knows what the

1 position was, whether or not tenure protected him in regards to  
2 the particular discipline. Dr. Tracy testified about his  
3 purported confusion, about the reliance on the union and  
4 reliance on the union attorneys.

5 We want to show Dr. Tracy, through his attorney,  
6 everybody was on notice of what the actual position was.

7 *THE COURT:* What Dr. Tracy's position was?

8 *MR. FEICHT:* And also confirms the conversation never  
9 happened, whether Jim admitted that he thought tenure protected  
10 him.

11 *THE COURT:* Dr. Zoeller testified to that also.

12 *MR. FEICHT:* They challenged that. We are not  
13 offering it for the truth, we are offering to provide notice.  
14 There are two levels of hearsay and each are satisfied, one,  
15 admission by a party, Jim's statements; and two, Michael Moats'  
16 email is not for the purpose of the truth, but notice. I have  
17 11th Circuit case law and notice is a well-established reason  
18 to offer a document into evidence.

19 *MR. BENZION:* They are trying to confuse the jury here  
20 in thinking that Dr. Tracy thought because he had tenure, he  
21 could do anything he wanted, which is not the statement that is  
22 expressed here.

23 He is saying he thought he couldn't be fired for his  
24 speech because he was tenured. They are going to confuse the  
25 jury and say the Plaintiff thought he could flaunt the rules

1 because he is tenured. That is not what this means, that is  
2 what they will say, your Honor.

3 MR. FEICHT: Again, that is an admission. The next  
4 sentence shows the notice that Dr. Tracy received directly  
5 about the union's position regarding the discipline. It is all  
6 about notice.

7 MR. BENZION: To that extent, it is cumulative. There  
8 is ample evidence in the record that he received notice of  
9 disciplines and he knew of the deadlines. That is not a matter  
10 in dispute any more.

11 THE COURT: Okay, I think I am going to keep 217-A  
12 out, even though I understand the limiting instruction you want  
13 the Court to give, and I do understand there is case law for  
14 notice. I don't want there to be any unfair prejudice that  
15 outweighs any probative value of the notice issue. I believe  
16 the notice issue has come in through other witnesses, and I  
17 think it is cleaner to avoid any potential prejudice by having  
18 hearsay within hearsay come in and give a limiting instruction  
19 that it is just for notice when I think other evidence amply  
20 addressed it.

21 I am going to sustain the objection to 217-A.

22 So, what does that do with the Johnson deposition? I  
23 will have 217 marked.

24 MR. CURLEY: Over our objection, which is noted,  
25 right, your Honor?

1           THE COURT: Yes.

2           MR. BENZION: Are we using any part of the Johnson?

3           MR. CURLEY: We need a minute to assess. We cut it  
4 down to three pages, now we have to recalculate.

5           THE COURT: Okay.

6           Okay. Where do we stand?

7           MR. FEICHT: We are going to make a proffer about  
8 217-A and page and line -- we understand the Court's ruling, we  
9 would like to make this part of the record.

10          THE COURT: Okay.

11          MR. FEICHT: And for other exclusions as well, we  
12 would like to make a proffer starting on page 13. Could I read  
13 the questions and answers into the record, page 13?

14          THE COURT: Yes.

15          MR. FEICHT: I am handing you what is marked  
16 Defendants 217-A.

17          MR. CURLEY: Your Honor, we could send the jury home  
18 at this point.

19          THE COURT: And what about from the Plaintiff?

20          MR. LEO: No objection, your Honor.

21          THE COURT: Okay. Yes, we will bring the jury in and  
22 do that.

23          MR. LEO: No reason for them to stay.

24          THE COURT: No, we will let them go. They will be  
25 happy about that, I am sure.

1           MR. CURLEY: In terms of scheduling, we will have the  
2 expert in the morning and we are done. I don't know how long  
3 it will take. I can't imagine it will be more than an hour.

4           THE COURT: Okay. But we need to make sure, we are  
5 going to do the motion after the jury leaves tonight and the  
6 jury instructions, we'll discuss that.

7           (Thereupon, the jury returned to the courtroom).

8           THE COURT: Welcome back, ladies and gentlemen, you  
9 may be seated.

10           There actually is no more evidence to present today,  
11 so we are going to let you leave a little early.

12           The next witness for the Defense is coming in tomorrow  
13 morning. We have other legal matters we can take up during  
14 this time, so it works out well.

15           We will be excusing you early tonight. Thank you for  
16 your patience today. Remember the important instructions,  
17 don't do any media regarding the case, do not discuss the case  
18 among yourselves or with anyone else, don't do any research  
19 about the case.

20           Have a nice evening and we will see everybody back --  
21 just trying to think -- we'll say 9:00 a.m. tomorrow morning.  
22 Thank you very much.

23           (Thereupon, the jury leaves the courtroom.)

24           THE COURT: All right. What we will do now, the Court  
25 will hear argument on the motion. You can argue it in full. I

1 know FAU's motion for judgment as a matter of law was filed at  
2 Docket Entry 431. I would go right into jury instructions, I  
3 know that is what we have to get done, all of the rulings will  
4 impact jury instructions.

5 If you want to argue the motion in full and then  
6 respond, that is fine.

7 I would like to keep it within a reasonable amount of  
8 time so we can turn our attention to jury instructions, so we  
9 can begin that process. Monday morning you need to come to  
10 court with the jury instructions, we need to stop at 12:00  
11 tomorrow, and all rulings have to be made on the jury  
12 instructions.

13 To that end, I will ask, if we don't complete it this  
14 evening, I don't want it to be too long an evening, we will  
15 have everyone come in at 8:00 tomorrow morning.

16 How long do you need to argue the motion?

17 *MR. FEICHT:* First we were going to do the proffer and  
18 jump into the argument.

19 *THE COURT:* Okay.

20 *MS. HUFF:* No longer than 30 minutes, your Honor, on  
21 the motion.

22 *THE COURT:* Okay. I don't think you need 30 minutes,  
23 I read it. I know the legal issue, especially since you have  
24 done the brief at 431, and I have reviewed it. I really want  
25 to try to get to the jury instructions as well this evening.

1           See if you can truncate that a bit.

2           *MS. HUFF:* Yes, your Honor.

3           *THE COURT:* All right. Make your proffer.

4           *MR. FEICHT:* Your Honor, the proffer is from the  
5       October 11, 2017 deposition of Thomas Johnson based on the  
6       Court's rulings as to many of the designations, and in  
7       particular, this is the designation that we would like to have  
8       been read to the jury starting on page 13, line seven.

9           "Question: I am handing you what is marked  
10       Defendant's 217-A. I will represent to you that this is a  
11       portion of the documents that you produced from your file.

12           "Okay.

13           "The first two pages appear to be an email that  
14       reference several attachments. Do you recognize this document?

15           "Yeah.

16           "What is this document?

17           "It's an email and some documents attached to it.

18           "Okay. Did you receive this email?

19           "Appears that way.

20           "And who sent you this email?

21           "It says Michael Moats.

22           "And who is Michael Moats?

23           "He is someone with the union.

24           "Did you receive this email from Mr. Moats on Friday,  
25       December 18, 2015?



1            "It says here that that's when it showed up in my box,  
2        so I would think so, yes. I don't have any independent  
3        recollection of it.

4            "Does this email demonstrate that the union provided  
5        you documents to assist you in the representation of Professor  
6        Tracy?

7            "Yes, I would think so. They sent me the documents so  
8        that I could represent Mr. Tracy. They wouldn't have sent it  
9        to me otherwise.

10           "And was the union cooperative in the process of your  
11        representation in defense of Professor Tracy?"

12           Skipping down to page 14. The witness answered, "If I  
13        needed anything, they sent it to me.

14           "And does the document that we've marked as  
15        Defendant's 217-A reflect that the union sent you the current  
16        Collective Bargaining Agreement, Professor Tracy's response to  
17        discipline regarding a 2012-2013 issue, the grievance filed  
18        regarding that 2012-2013 grievance issue and then the  
19        settlement resolving that 2012-2013 grievance issue.

20           "Yes, it appears that way."

21           The Defendant would proffer 217-A, which is the email  
22        just authenticated by the witness, is not hearsay as well as  
23        excluded from hearsay under Rule 801(d)(1). As a declarant  
24        testifies and is subject to cross-examination about a prior  
25        statement and the statement is consistent with the declarant's

1 statement and is offered to rebut and expressed or implied  
2 charge that the Defendant fabricated it -- or to rehabilitate  
3 the declarant's credibility of a witness when attacked on other  
4 grounds.

5 Mr. Moats was offered as a witness and Defense used  
6 cross-examination through the deposition designation to imply  
7 he was not being truthful regarding the statement within the  
8 body of the email, 217-A. So, for that reason, it is not  
9 hearsay under the Rule; and, additionally, the arguments  
10 previously made by counsel regarding the fact it is not being  
11 offered for the truth of the matter asserted for notice.

12 *THE COURT:* Notice to?

13 *MR. FEICHT:* It is notice from Mr. Moats to Dr.  
14 Tracy's attorney regarding what Dr. Tracy said and what the  
15 union's advice and response was to that, the email, the  
16 relevant portion of the email denotes that.

17 So, we are offering it for the purpose of showing Dr.  
18 Tracy's attorney, who is acting as an agent of Dr. Tracy, not  
19 only was it admitted by the Plaintiff, but what the union  
20 communicated to him regarding the discipline of the subject of  
21 this litigation.

22 *THE COURT:* Let me ask, separate and apart from the  
23 content of 217-A, did you, nevertheless, want to establish that  
24 the union did provide Thomas Johnson with these documents  
25 separate and apart from the content of 217-A?

1           MR. FEICHT: Yes, your Honor.

2           THE COURT: Because that wouldn't seem to be  
3 objectionable.

4           I made the ruling on 217-A, the content of it, but the  
5 fact that he received an email from Moats and attached to the  
6 email was -- were documents to assist in your representation,  
7 because now that has been an issue as well, who was helping Dr.  
8 Tracy or not.

9           Putting aside the content of 217-A, is there anything  
10 objectionable from the Plaintiff's side to that line of  
11 questioning?

12          MR. BENZION: That the lawyer was provided the  
13 documents?

14          THE COURT: Yes, everything that was just read, except  
15 the document itself, 217-A.

16          MR. BENZION: There is no objection to the fact that  
17 the lawyer was provided the documents.

18          THE COURT: No objection to those pages and lines?

19          MR. BENZION: So long as the document remains  
20 inadmissible.

21          THE COURT: Right.

22          MR. FEICHT: Defense position on that, just like the  
23 documents were transmitted to Dr. Tracy's lawyer, this  
24 information that is in the content of the email is additionally  
25 provided for the same reasons. The union is providing his

1 lawyer with information, including documents and conversations  
2 and advice.

3 *THE COURT:* Right. I will allow you to read what you  
4 just read.

5 *MR. FEICHT:* Without Defendant's 217-A coming into  
6 evidence?

7 *THE COURT:* If you want to think about that, the jury  
8 has left, you can think about that.

9 *MR. FEICHT:* We will consider that, your Honor. That  
10 is the end of the proffer regarding 217-A.

11 Obviously, we understand the Court's ruling regarding  
12 the other designations which is the reason I withdrew the  
13 remaining testimony.

14 *MR. BENZION:* May I add to that proffer?

15 *THE COURT:* Yes.

16 *MR. BENZION:* I think the Court's ruling was broader  
17 than hearsay --

18 *THE COURT:* The proffer is something you would offer.  
19 Is there a part of Johnson you would offer? I am not taking  
20 argument now. Is there a proffer --

21 *MR. BENZION:* I will refrain, your Honor.

22 *THE COURT:* A proffer is what you would proffer having  
23 been read that the Court would not allow otherwise. I have  
24 said they could read it, but without the document itself.

25 Is there a proffer you would have want to have read

1 from the Johnson deposition?

2 MR. BENZION: Not from the proffer, more the argument.

3 THE COURT: I don't need any more argument.

4 MR. BENZION: Yes, your Honor.

5 THE COURT: Okay, the motion for Judgment as a Matter  
6 of Law.

7 MS. HUFF: Yes, your Honor.

8 MR. BLICKENSDERFER: Your Honor, just before you  
9 begin, Steven Blickensderfer for the Plaintiff, yesterday, I  
10 didn't realize we were going to do it before Defendant's case  
11 was over, I thought we were all going to do it at the same  
12 time. I don't think we can move at this time what we would  
13 like to move for.

14 THE COURT: Right, only -- well, that is true, the  
15 Defendant's motion would only be as to what has occurred at the  
16 close of the Plaintiff's case.

17 MR. BLICKENSDERFER: We are at the point where the  
18 Court can consider this now, hear the argument, but for the  
19 record, know that Docket Entry 431 was filed today while the  
20 Defendant was still presenting its case. If the Court is  
21 inclined to consider any issue further, we would like to file a  
22 written response at the Court's instruction.

23 THE COURT: There is one issue that does need to be  
24 taken up if it is disputed.

25 I am not clear whether it is disputed, otherwise I

1 agree we could wait, and it is true Defendant's motion was only  
2 just filed.

3           There is this issue, and it appeared in a footnote in  
4 the jury instructions, about the limited issue of the  
5 classification of Plaintiff's speech, private or public, as  
6 well as whether the speech was on a matter of public concern.

7           Let me first ask, is that still in dispute?

8           *MS. HUFF:* Yes, your Honor, depending on what  
9 Plaintiff's speech actually is. We are not sure on the  
10 evidence that came in and presentation what they're claiming  
11 the speech is. That is what we were going to discuss.

12           *THE COURT:* And your other was just going to be more  
13 an insufficient evidence type of argument?

14           *MS. HUFF:* Questions of law we wanted to raise, and we  
15 do have more of a factual issue on the weight of the evidence.  
16 We were going to present those questions of law, and the other  
17 argument was on the causation question and weighing of the  
18 evidence.

19           *THE COURT:* Why don't you focus on the legal issues, I  
20 want to hear those. If certain rulings need to be made with  
21 respect to how the jury instructions are framed, that is the  
22 reason, and I will try to focus my attention on those issues  
23 and have the Plaintiff respond on those.

24           *MS. HUFF:* We will do that, your Honor.

25           We understand to keep our remarks brief, but may

1 Attorney Griffin and I split the argument?

2 *THE COURT:* That is fine.

3 *MS. HUFF:* I do want to state the four bases of our  
4 motion, but I will highlight for you the legal questions. I do  
5 want to state for the record all of our bases.

6 The first fatal flaw in the Plaintiff's case is they  
7 failed to identify the specific protected speech at issue.  
8 That is a question of law and must be heard by the Court before  
9 the case goes to the jury.

10 The second, Plaintiff's speech is not protected  
11 because it is outweighed by the university's interest in  
12 peacefully fulfilling its educational mission, that is the  
13 Pickering balancing, also a question of law that must be  
14 decided by the Court before it can go to the jury.

15 The third question of law regards the comparator  
16 issues and similarly situated employees, we filed a motion on  
17 that, and that is a question of law. If the Plaintiff has not  
18 submitted evidence of sufficient and valid comparators the  
19 causation issue should not go to the jury.

20 The last point, we believe the Plaintiff cannot prove  
21 causation based on their evidence, that is a question of fact.  
22 We believe the facts weigh so heavily on the university, no  
23 jury could find against the university at this point.

24 We'll focus on the legal questions.

25 *THE COURT:* Okay.

1           MS. HUFF: The legal question, it's a four prong test.  
2     The first prong is regarding a prima facie case, what is  
3     protected speech. In order to meet that prong, the Plaintiff  
4     has to identify the protected speech and show the speech was  
5     made as a citizen on a matter of public concern. We have a  
6     problem, we cannot figure out what the protected speech is, and  
7     the Plaintiff repeatedly referred to his speech as blogging or  
8     online activity.

9           Under Eleventh Circuit case law, including Goffer  
10    versus Marbury, 956 F.2d 1045, pen cite 1050, Eleventh Circuit,  
11    1992, Plaintiff is not permitted to refer to speech in a  
12    unitary or global fashion, they should be identifying specific  
13    instances of speech, and that is necessary for the jury to make  
14    a causation analysis, they must tie a specific instance of  
15    speech to the termination.

16          Eleventh Circuit precedent, Kurtz versus Vickrey, 855,  
17    F.2d 723, Eleventh Circuit, 1988.

18          There are many instances of speech over a several  
19    years period, and each of those need to be broken out and  
20    weighed separately when determining the causation analysis.  
21    Here we have instances of speech raised in 2013, regarding the  
22    blog, I believe that is Plaintiff's Exhibit 47, two blog post  
23    entries from December 20, '12, and one from January 2013.

24          If we talk about the blog posts we have a temporal  
25    problem; for three years the Plaintiff was allowed to blog,



1 talk conspiracies, which was the subject of the blog, he got  
2 great job evaluations from his supervisors and he was never  
3 told to take down his blog or censored in any way.

4 He was asked to provide a disclaimer in 2013, and was  
5 not interfered with again in regards to the blogging.

6 So, we don't see that this uproar -- I know on summary  
7 judgment there was a question about whether there was continued  
8 outcry or continued uproar that rendered that temporal  
9 proximity argument moot. We didn't hear any evidence that in  
10 early 2014 or '15, that there was any kind of uproar that would  
11 be able to tie his termination back to that speech from 2013.

12 We think if they are relying on the 2013 speech they  
13 have a big problem with temporal proximity.

14 What we heard in the trial and never flushed out in  
15 the second amended complaint or summary judgment, the Pozner op  
16 ed piece was somehow the speech or protected activity that  
17 caused Plaintiff's termination.

18 That was speech undisputedly written by two people,  
19 Lenny and Veronique Pozner, the Plaintiff did not write those  
20 articles. He was writing in response to the articles, that  
21 would be a matter of public concern, because we saw the  
22 response to the Pozners was regarding his private copyright  
23 claim and was he allowed to use a picture without paying  
24 copyright laws. That is not a matter of public concern, that  
25 involves the Plaintiff's private interest.

1           If he blogs about the Pozners or a letter that Jim  
2     Fetzer drafted and the Plaintiff modified, there is no evidence  
3     that the university knew about that speech before the  
4     termination decision was made, because what we saw was the  
5     termination decision, at least the letter, was submitted from  
6     Heather Coltman to Diane Alperin before the news of the Pozner  
7     op ed had broken. There is none from 2013, and they haven't  
8     cited any specific speech in the interim which could be the  
9     basis of a First Amendment retaliation claim.

10           We don't know what the speech is, we are having a hard  
11     time, and the jury would have a hard time with the causation  
12     issue trying to determine just the threshold legal issue.

13           I will have Ms. Griffin handle the Pickering balance.  
14     That is another question of law regarding whether the  
15     Plaintiff's speech was protected.

16           *MS. GRIFFIN:* Good afternoon, your Honor.

17           *THE COURT:* Good afternoon.

18           *MS. GRIFFIN:* In addition to having the fundamental  
19     issue of not having identified a specific instance of speech  
20     the Plaintiff alleges he was retaliated against, the Plaintiff  
21     cannot establish that the interest in the speech outweighs the  
22     university's interest in peacefully fulfilling its educational  
23     mission, Plaintiff must make the showing that even though, the  
24     speech was cause for termination. This is Eleventh Circuit  
25     case law before the judge should decide to send the issue of

1 causation to the jury.

2           The second prong of the Pickering balancing test  
3 weighs heavily in favor of the university and shows the  
4 university would not have been prevented from taking action  
5 against the Plaintiff had they chosen to do so because the  
6 interest in the speech did not outweigh their interests.

7           When considering this issue, the Courts consider  
8 several different factors, including whether the statement  
9 impairs discipline by superiors or harmony among co-workers,  
10 whether it has a detrimental impact on the close-working  
11 relations for which personal loyalty and confidence are  
12 necessary, and whether it impedes the performance of the  
13 speaker's duties or interferes with the regular operation of  
14 the enterprise.

15           Another frequently cited consideration is whether it  
16 impedes the university's interest in enforcement of its  
17 policies. Both the evidence of the disruption to the  
18 university and the evidence that the university's interests in  
19 peacefully and efficiently fulfilling its educational mission  
20 are significant in the evidence produced during the Plaintiff's  
21 case in chief, your Honor.

22           Dr. Alperin testified that the public reaction in 2013  
23 was disturbing to the function of the university as well as its  
24 reputation. She testified the university received hundreds, if  
25 not thousands of phone calls and letters from the individuals

1 in the community. She said the phone calls clogged the phone  
2 lines, there were entire departments that were inundated with  
3 contact from the public in 2013.

4 These contacts were from alumni, parents, faculty,  
5 students, donors, member of the general public, people who are  
6 part of the university community, and which the case law shows  
7 are part of the internal operations because that is who the  
8 university relies on as part of its community.

9 The evidence also shows there was a disruption  
10 internally with faculty. Plaintiff himself testified, and Dr.  
11 Alperin confirms, part of the annual assignment is a service  
12 assignment, service on a committee with other faculty members.  
13 Dr. Alperin testified that Plaintiff's comments created a  
14 dissidence within the university. Three university faculty  
15 members wrote an opinion piece to the *Palm Beach Post* which  
16 criticizes him, and he testified that letter was distributed  
17 internally which he viewed as harassment. That goes to show  
18 there were internal disputes between the faculty members.

19 The university also has significant interests in  
20 protecting the safety of students, faculty and staff. We heard  
21 significant testimony about safety concerns for the Plaintiff's  
22 safety and safety of his family and safety for students,  
23 faculty and staff on campus.

24 Dr. Coltman testified she was so concerned about the  
25 nature of the emails and phone calls she was receiving that she

1 requested additional police presence at the college because she  
2 also received complaints from faculty concerned for their  
3 safety and the safety of the students. She testified other  
4 colleges did the same, around the same time, in January 2013.

5 In fact, the hostility was so great that, as the  
6 Plaintiff's own email showed, somebody tore the Plaintiff's  
7 chapter out of the textbook in the campus book store.

8 The university also has a significant interest in the  
9 reputation and standing in the community. There was testimony  
10 there was international media attention critical of the  
11 university, CNN covered his article multiple nights in a row,  
12 and the perception of the public seemed to be the university  
13 was sponsoring these statements, and the university has an  
14 interest in controlling its own publications, your Honor.

15 Finally, the university has an interest in its own  
16 policies, including conflict of interest and disclaimer  
17 requirements that the Plaintiff was accused of not complying  
18 with and the university certainly would have had a reasonable  
19 basis for fear there would have been a substantial disruption  
20 in 2015 as well. The Eleventh Circuit says the university does  
21 not have to wait for disruption, even though it did not  
22 consider the Plaintiff's comments when it made its decisions,  
23 it would not have been prevented from taking adverse action.

24 Ms. Huff will address the final legal consideration.

25 *THE COURT:* Okay.

1           MS. HUFF: The two prongs that Ms. Griffin and I  
2 addressed, the first prong, identifying the speech, and the  
3 Pickering balancing, those are the two prongs that the Court  
4 must decide before sending it to the jury. The pretext  
5 argument, comparators is also a question of law. If the  
6 Plaintiff does not actually present valid comparators, it  
7 hasn't shown pretext and that can defeat the causation as a  
8 matter of law.

9           I know the Court has received briefing on this. I  
10 will go through this quickly. I will hit the high points for  
11 the Court.

12           The Silvera case cited to in the previous briefing  
13 highlights the requirement that to prove comparators for  
14 judgment as a matter of law, the comparators must be similarly  
15 situated in all relevant aspects, and their conduct must be  
16 nearly identical, not comparing apples with oranges.

17           You heard testimony from Steven Kajiura, a faculty  
18 member. Mr. Kajiura is not a valid comparator, he was  
19 disciplined for different reasons, he has a different  
20 supervisor in a different college, and he filled out an outside  
21 employment form, unlike the Plaintiff in this case, which the  
22 Plaintiff in this case refused to do so.

23           To the extent that the Plaintiff tries to argue other  
24 faculty members are similarly situated, they are also not valid  
25 comparators. He does not show a faculty member who was asked

1 to fill out an activity form and failed to do so in an  
2 insubordinate fashion.

3 In fact, the only person who was treated similarly and  
4 had the similar conduct to Professor Tracy was Ms. Copeland, a  
5 fellow instructor engaged in outside activities and it was  
6 discovered she was engaged in outside activities and asked to  
7 report, and she did report, but unlike Plaintiff, was  
8 incomplete in the forms and did not disclose all of her  
9 activities. She was terminated.

10 There was no second special set of rules for Professor  
11 Tracy. This is how the university applies the rules. Florida  
12 Atlantic University should prevail.

13 I will briefly recap three points. Fundamentally, it  
14 is Plaintiff's duty in a First Amendment case to say what the  
15 protected speech is, and we should near the end of trial know  
16 what speech they are talking about. They have had five or six  
17 days where they could have introduced evidence of the speech,  
18 and they chose not to do so. We don't know what speech they  
19 are talking about.

20 The university's interest outweighs any right to  
21 blogging, they have not presented valid comparators, and for  
22 that reason, we ask the Court to grant judgment as a matter of  
23 law.

24 *THE COURT:* All right. Thank you. Plaintiff's  
25 response.

1           MR. BLICKENSDETFER: May it please the Court, your  
2 Honor, I will take the arguments in turn starting with the  
3 constitutionally protected speech.

4           In looking over the Court's Exhibits 1 and 2  
5 yesterday, we agree -- the speech hasn't been hidden, Defendant  
6 knows what the speech is. We set forth in the complaint from  
7 the very beginning that he had been blogging in his private  
8 capacity on a matter of public interest, specifically on media  
9 coverage or mass coverage of events such as Sandy Hook,  
10 coverage surrounding them, as well as the alleged involvement.

11           Case law such as in *Yates versus United States*, 354  
12 U.S. 298, 314, 1957, private citizens have a First Amendment  
13 right to criticize Government policies, that is the  
14 constitutionally protected speech, and the Defendant admitted  
15 there is no mystery what the speech was, the Defendant knew  
16 about it.

17           The Plaintiff testified that in 2013 he was blogging  
18 about Sandy Hook and whether it happened, whether it was a FEMA  
19 drill. We heard testimony for the past six days about that.  
20 He blogged on and off about that. The jury has plenty of  
21 evidence to conclude he was blogging about Sandy Hook, and has  
22 the Defendant's 224, those are the bloggers on the blog.

23           We have the chapter from which they could read in the  
24 *Nobody Died at Sandy Hook* book, that we heard from time to time  
25 again. It is disingenuous to claim the Defendant doesn't know



1 what speech is at issue when the Plaintiff is claiming that the  
2 speech is constitutionally protected.

3 One of the issues we would raise is whether the speech  
4 is constitutionally protected and should be ruled in favor of  
5 the Plaintiff.

6 The jury should know it involves casualty events,  
7 shootings and Government conspiracies. The Defendant hasn't  
8 offered any evidence that he was blogging on something else.  
9 Their whole case is distancing himself from his speech, and the  
10 jury has no other evidence but to conclude that the speech was  
11 anything but this.

12 But the Court could rule on that tomorrow when Defense  
13 rests.

14 At the moment, there is more than enough evidence from  
15 which the Court could conclude the jury knows what the  
16 constitutionally protected speech is from when we started voir  
17 dire the first day of trial up to today, your Honor.

18 Unless the Court has any questions as to that issue, I  
19 will address the second argument which concerns the Pickering  
20 analysis. This made me question what is going on here because  
21 the Defendant began by taking the position that this case has  
22 never been about Plaintiff's speech, that Plaintiff's speech  
23 was never a factor in the decision to terminate the Plaintiff,  
24 that is their case to today.

25 The Pickering balancing is when the speech was a

1 reason for the firing, but the Governmental interest outweighs,  
2 substantially outweighs the constitutionally protected interest  
3 in the speech. That is what we talk about when we talk about  
4 Pickering. To bring a current event in, when UF decided not to  
5 allow a white supremacist to come on the campus, they said no  
6 because your speech is disruptive. They said our interest in  
7 protecting our students and maintaining safety, that is why we  
8 are not letting you speak here, and that is why Pickering  
9 allows you to do that.

10 The Defendants, when they made the decision to fire  
11 Professor Tracy, they made the decision that the speech had  
12 nothing to do with it.

13 They could have made the decision based on a speech  
14 and brought all that Pickering evidence out and said it  
15 outweighs it, we would have had to bring police in. By saying  
16 they made a decision based on the speech, because they wanted  
17 to take advantage of the Pickering analysis, we have proven our  
18 claim. The only question that should be on the verdict form is  
19 whether or not the speech -- or their interest in the speech  
20 outweighs Professor Tracy's.

21 It is a different case, and it is not the case that  
22 the Court has been hearing for the past six days.

23 I can provide the Court with two cases which we did in  
24 the famous Footnote 3. The first is Acevedo-Delgado versus  
25 Rivera, 292 F.3d 37, 45, the First Circuit, 2002. They held

1 the Pickering instruction inapposite when the Defendant denies  
2 having fired Plaintiff for her refusal to contribute, and the  
3 refusal to contribute was the speech in that case. Pickering  
4 doesn't apply here when a speech was not a factor in the  
5 analysis.

6 The second case is Marshall versus Allen, 984 F.2d  
7 787, 797, Footnote 8, Seventh Circuit, 1993.

8 To step back, this comes from Connick versus Myers,  
9 461 U.S., 138, 149, 1983, an employee fired for speech has no  
10 claim unless he is speaking on a matter of public concern.  
11 That is where the confusion has been about whether he is just a  
12 private citizen and writing on Governmental conspiracies and  
13 that is protected, or whether he is writing on a public  
14 concern. We feel the Court should rule as a matter of law and  
15 it should be in our favor.

16 This is quoted from Garcetti versus Ceballos, 547 U.S.  
17 410, pages 424 to 45, 2006. The speech does not, quote, "owe  
18 its existence" to Tracy's position as a tenured professor. The  
19 jury has heard he has been doing this on the side, it is his  
20 hobby. Thus, it doesn't make sense for the Court to apply  
21 Pickering when the Court said it did not take speech into  
22 account when it made the decision as FAU has done it here. To  
23 apply it would be error.

24 Even if Pickering would apply, and the only question  
25 is whether or not their interest in his speech, that is the

1 reason they fire him, or so they say, substantially outweighs  
2 his interest. We argue there is more than enough evidence  
3 showing that his interest outweighed theirs. We didn't hear  
4 much evidence, we heard some, but we didn't hear that the  
5 university was as up in arms in 2015, as it was in 2013.

6 The testimony was in 2013, there was cop presence on  
7 the university, you didn't hear that in 2015. Certainly the  
8 school was inundated with angry public emails, we didn't hear  
9 the full extent sufficient to rule that a Pickering balancing  
10 weighs in their favor if that even were the rule.

11 They would have to show that this would be a  
12 completely different case if Pickering would apply.

13 I have beaten on that issue enough.

14 I would like to address the comparator argument. This  
15 is a First Amendment retaliation claim at issue, and they keep  
16 citing to Title VII discrimination cases. One of the elements  
17 which a Plaintiff must demonstrate is that he was replaced by a  
18 person outside the protected class or was treated less  
19 favorably than a similarly situated individual outside the  
20 protected class.

21 Here, whether or not FAU applied the policy even  
22 handedly or uneven handedly, this is not entitled to a judgment  
23 as a matter of law at this time. A First Amendment retaliation  
24 claim, and retaliation claims more generally, do not require  
25 evidence of a similarly situated individual to establish a

1     prima facie case.

2             As I previously mentioned, the Bennett versus Hendrix  
3     case, 423 F.3d 1247, 1250, Eleventh Circuit, 2005, that case  
4     sets forth the elements of a First Amendment retaliation claim,  
5     one, whether the speech was protected; two, whether the  
6     Defendant's retaliatory conduct adversely affected the  
7     protected speech, which we feel they did by firing him; and  
8     three, that there is a causal connection between the  
9     retaliation and the adverse effect on speech. We think Bennett  
10    is the guide to lead this Court as to the proper test to apply.

11            The Silvera case, that is Title VII, even under those  
12    cases, once the judge finds the Plaintiff has made the minimum  
13    necessary demonstration, which is the prima facie case, and the  
14    Defendant has produced a nondiscriminatory -- or nonretaliatory  
15    discrimination, the burden shifting served its purpose, and the  
16    only question for the jury to consider is whether the Plaintiff  
17    is a victim of discrimination or retaliation.

18            Now, based on all the evidence presented by the  
19    Plaintiff, is whether -- you know, which includes similarly  
20    situated employees, is whether the Defendant's basis for  
21    termination was pretextual.

22            Defendant's argument that the comparator evidence is  
23    necessary to establish pretext would create a requirement so  
24    narrow that there could never be a retaliation claim.

25            I would like to draw the Court to Arrington versus

1     Dickerson, I will provide the Court with the site. 915 F.Supp.  
2     1516, at page 1523, Middle District of Alabama, 1996. It  
3     provides an analysis, that is a First Amendment retaliation  
4     case, unlike the elements necessary to establish a prima facie  
5     case of discrimination, comparator evidence is helpful, but not  
6     necessary. That is bottom line of my argument.

7             Even if it were necessary to have comparator evidence,  
8     we feel we have established that with the similarly situated  
9     employees who were under the policy. Kajiura, how he was  
10    disciplined, McGetchin, no disclaimer, and Copeland helps us,  
11    and Copeland, who forgot to fill in a form, all of that is  
12    relevant to help to prove the cause of action for retaliation.

13            Unless the Court has any questions as to any of that,  
14    the causal argument raised in the brief, we did not have an  
15    opportunity to read it so we can reply to it, but we will be  
16    more than prepared to make a response to that, too.

17            THE COURT: Okay, I understand.

18            All right. So --

19            MS. GRIFFIN: Response.

20            THE COURT: We will take a five minute recess and come  
21    back.

22            *(Thereupon, a short recess was taken.)*

23            THE COURT: Okay. What I would like to do, what I  
24    think the most prudent thing to do is as follows: I have heard  
25    the motion for Judgment as a Matter of Law both orally by the

1 Defense, which really is only being made at the close of the  
2 Plaintiff's case because the Defendant has not closed its case  
3 yet. Ultimate rulings I prefer to make at the end of the  
4 Defendant's case and just -- you know, very briefly, we know  
5 that Federal Rule of Civil Procedure 50(a) states that if a  
6 reasonable jury would not have a legally sufficient evidentiary  
7 basis to find for a party on an issue, the Court may resolve  
8 the issue against the party and grant a motion for Judgment as  
9 a Matter of Law against the party on the claim or defense that,  
10 under the controlling law, can be maintained or defeated only  
11 with a favorable finding on that issue.

12 The standard that governs is that if the facts and  
13 inferences point so strongly and overwhelmingly in favor of one  
14 party that the Court believes that reasonable men could not  
15 arrive at a contrary verdict, granting of the motion is proper.

16 On the other hand, if there is substantial evidence  
17 opposed to the motions, that is, evidence of such quality and  
18 weight that reasonable and fair minded men in the exercise of  
19 impartial judgment might reach different conclusions, the  
20 motions should be denied and the case submitted to the jury.

21 It is the function of the jury as the traditional  
22 finder of the facts, and not the Court, to weigh conflicting  
23 evidence and inferences and determine the credibility of the  
24 witnesses.

25 Watts versus Great Atlantic and Pacific Tea Co. 842

1 F.2 307, at 309 to 310, Eleventh Circuit, 1998. All evidence  
2 must be viewed in the light most favorable to the non-moving  
3 party. Gupta versus Florida Board of Regents 212 F.3d 571,  
4 582, Eleventh Circuit, 2000.

5 We also know, and this is set forth pretty clearly in  
6 the commentary, author's commentary on Rule 50, that the Court  
7 is under no obligation to grant a Judgment as a Matter of Law  
8 even if the record supports the motion. The Courts allow the  
9 jury to reach a verdict in order to minimize -- if the jury  
10 reaches the same conclusion as the judge, the judge need take  
11 no action.

12 If the jury reaches the opposite conclusion, the judge  
13 can enter a Judgment as a Matter of Law. And also, that the  
14 Court can reserve ruling even from the end of the Plaintiff's  
15 case until the end of the Defense case.

16 This case is a little unusual in that there are  
17 certain findings, of course, that we know the Court must make.

18 I believe the Court must make that at the close of the  
19 evidence basing it on, among other cases -- in the Court's view  
20 it is based on other cases, Moss versus City of Pembroke Pines,  
21 782 F.3d 613, Eleventh Circuit, 2015, which really speaks to --  
22 it does say the matter is handled on motions for Judgment as a  
23 Matter of Law, but the Court reads it, it is at the close of  
24 evidence that the Court must make certain determinations.

25 Certain determinations in this case are as a matter of



1 law and therefore not something the Court could even defer and  
2 let the jury determine and follow the procedure that the Court  
3 just indicated is possible in certain cases.

4 So, the Court understands that it must ultimately make  
5 a ruling as a matter of law on the issue of the classification  
6 of the Plaintiff's speech, whether it was public or private,  
7 and whether the speech was on a matter of public concern. It  
8 appears that issue between the parties is in dispute, and I am  
9 more comfortable making that decision after the close of all of  
10 the evidence, so I am not going to make that ruling right now.

11 The other ruling the Court must make is with the  
12 Pickering balancing test and in whose favor, which parties'  
13 favor it falls, and the Court needs to make all of those legal  
14 determinations and that will impact the jury instructions and  
15 what the jury is asked to do.

16 I am not not going to rule on those issues, but I am  
17 more comfortable ruling on the issues after all of the evidence  
18 has been presented.

19 What I am going to do, after the Defendant closes  
20 tomorrow, one more witness short, I will see if there is any  
21 rebuttal. I think we will have time. I want to know if there  
22 are supplementary arguments. That will give Plaintiff more  
23 time. You were hit with a pretty big brief today.

24 Anyone who wants to make supplemental arguments, not  
25 duplicative, not cumulative, but you can make them so I've

1 heard everything, and I will make the rulings that I know I  
2 have to make before it goes to the jury.

3 But in the interest of efficiency and making some  
4 headway on jury instructions, what I am going to do is proceed  
5 in this hypothetical posture, and it is just a hypothetical  
6 posture because I haven't made the rulings, but the Court had  
7 to put together the instructions so we had something to work  
8 with. We know the Plaintiff and Defendant submitted the  
9 instructions at various docket entries.

10 I identified Court Exhibit 1, which is a red line  
11 version, and Court Exhibit 2, which is a clean version.

12 And you know what, there is one more thing I need to  
13 get which is on my desk. Hold on one moment.

14 (Pause).

15 *THE COURT:* In the interest of time, I tried to  
16 incorporate everything you all have said about jury  
17 instructions.

18 They are written in a hypothetical manner, and what I  
19 mean by that, the Court hasn't made a ruling, and I don't want  
20 you to presuppose the way the instructions are written suggests  
21 a ruling, but the first stab the Court took at reconciling both  
22 of your instructions would arise out of a ruling that the Court  
23 would have to have made, which it hasn't. So, it may mean the  
24 jury instruction is changed.

25 So, if we nail this down it wouldn't be so hard to

1 change it if the ruling is in a different way, and furthermore,  
2 we could have you bring in an alternative particular version if  
3 the Court grants the motion for Judgment as a Matter of Law.

4 But they are written in such a way as if the Court has  
5 made a determination that the motion for Judgment as A matter  
6 of Law has been denied, and are written in such a way that the  
7 Court has made a legal determination, again, just for purposes  
8 of the draft, that the Plaintiff spoke on a matter -- spoke as  
9 a private citizen on a matter of public concern and the  
10 Pickering analysis weighed in favor of the Plaintiff.

11 That is how they are written, so you have the context.  
12 It is not a ruling, it is not a determination, but it is a  
13 framework for us to discuss this set of jury instructions and  
14 we can talk about how they would be different and what the  
15 alternative instruction would be if the rulings on any one of  
16 the issues went differently, which the Court will make at the  
17 close of all of the evidence tomorrow.

18 With that in mind, if you could put in front of you  
19 whatever I labeled Court Exhibit 1, Court Exhibit 2, and I go  
20 page by page and I can hear what objection, if any, there is to  
21 the instruction.

22 We will begin with the cover page, I will say  
23 Plaintiff, Defense. If there is no objection, no objection.

24 Cover page.

25 MR. BLICKENSDETFER: No objection.

1           *MS. HUFF:* No objection for Defense.

2           *THE COURT:* There are no page numbers because jury  
3 instructions can switch out a lot. It is hard, that is why I  
4 will call it what it is. That is Court's instructions to the  
5 jury.

6           *MR. BLICKENSDETFER:* No objection.

7           *MS. HUFF:* No objection.

8           *THE COURT:* Duty to follow instructions, Government  
9 entity or agency involved. Plaintiff.

10          *MR. BLICKENSDETFER:* No objection.

11          *THE COURT:* Defense.

12          *MS. HUFF:* No objection.

13          *THE COURT:* The next one is consideration of direct  
14 and circumstantial evidence, argument of counsel, comments by  
15 the Court.

16          *MR. BLICKENSDETFER:* No objection.

17          *MS. HUFF:* No objection.

18          *THE COURT:* Next one, credibility of witnesses.  
19 Plaintiff.

20          *MR. BLICKENSDETFER:* No objection.

21          *THE COURT:* Defense.

22          *MS. HUFF:* No objection.

23          *THE COURT:* Next one, impeachment of witnesses because  
24 of inconsistent statements. Plaintiff.

25          *MR. BLICKENSDETFER:* No objection.

1           MS. HUFF: No objection.

2           THE COURT: Next one, expert witness.

3           MR. BLICKENSDETFER: No objection.

4           THE COURT: Defense. No objection to that one?

5           MS. HUFF: No objection.

6           THE COURT: Next one is responsibility for proof,  
7 Plaintiff's claims, preponderance of the evidence. Plaintiff.

8           MR. BLICKENSDETFER: No objection.

9           THE COURT: Defense.

10          MS. HUFF: No objection to this page.

11          THE COURT: Next page, responsibility for proof,  
12 affirmative defense, preponderance of the evidence, from the --  
13 do you have a set in front of you?

14          THE LAW CLERK: I have a clean set.

15          THE COURT: Okay. Responsibility of proof,  
16 affirmative defense, preponderance of the evidence. Plaintiff.

17          MR. BLICKENSDETFER: No objection.

18          THE COURT: Defense.

19          MR. CURLEY: We object to the removal of paragraph two  
20 and three. It will come up later, but we want our objection  
21 noted.

22          THE COURT: When you say it will come up later, what  
23 do you mean?

24          MR. CURLEY: There are issues with the suggested  
25 revisions with respect to FAU claims that it would have

1 discharged Professor Tracy regardless of the speech on his blog  
2 and limited to that extent.

3 We raised both of those issues. In later revisions to  
4 the instructions, we are going to talk about those. It might  
5 be better to talk about it then. It might be the Court's  
6 thought that these are covered in other places, but I am not  
7 waiving the objections.

8 *THE COURT:* One question I had is whether affirmative  
9 defense two and three are distinct from number one. That is  
10 one question I had.

11 Do you see those as distinct?

12 *MS. HUFF:* Yes, your Honor. Number one is an  
13 affirmative defense that is based on the causation prong that  
14 we have to present a legitimate non-retaliatory reason. The  
15 fourth is the four point test on the retaliation claim, four  
16 prong, employer claims it would have discharged the employee  
17 regardless of the protected speech, that is built into the  
18 claim itself. It appears later, we are not comfortable taking  
19 it out of the affirmative defense list. That is a burden to  
20 prove and it is an affirmative defense.

21 *THE COURT:* Let me see where that is.

22 So, your affirmative defenses are on page 73 of Docket  
23 Entry 329. You raise, you know, quite a few of them, actually  
24 16.

25 *MS. HUFF:* Is there the answer to the second amended

1 complaint?

2 *THE COURT:* Yes.

3 *MS. HUFF:* The case has been significantly narrowed,  
4 so that would render some of them inapplicable.

5 *THE COURT:* You want to revisit that as we go along.  
6 You think it is better to wait?

7 *MR. CURLEY:* Yes, I do.

8 *THE COURT:* We will go back. Okay, I will put a  
9 sticky there.

10 Other than the elimination of two and three, how does  
11 it otherwise look to the Defendant?

12 *MS. HUFF:* No objection besides those eliminations.

13 *THE COURT:* No other objections. Okay. All right.

14 The next page is the one that says duty to deliberate  
15 when both Plaintiff and Defendant claim damages or when damages  
16 are not an issue.

17 *MR. BLICKENSDETFER:* No objection.

18 *MS. HUFF:* No objection.

19 *THE COURT:* The next one is public employee, First  
20 Amendment claim, discharge or failure to promote, free speech  
21 on a matter of public concern. Have you it through the lens of  
22 the Court having made the rulings we discussed, understanding  
23 completely that it likely would be a different instruction if  
24 any of those rulings were favorable to the Defense, in which  
25 case we would be looking at a different instruction?

1           MR. CURLEY: This one is a little more difficult  
2 unless we are going conceptually. I know the Court is looking  
3 to get final instructions here.

4           You know of our issues regarding the expressions of  
5 speech, including speech he made online.

6           We have significant objections to that, putting it  
7 mildly. Including speech makes it sound like that is just  
8 part -- there is no limitation here.

9           THE COURT: Okay, let's just take it from the top.  
10 Let's --

11          MR. CURLEY: The claim was a blog.

12          THE COURT: Okay. So, where is the first -- first let  
13 me ask, does the Plaintiff have any objections?

14          MR. BLICKENSDETFER: No, your Honor, because we  
15 believe at this point the Court has given the jury an  
16 instruction on the statement of the case, and at this point we  
17 thought this is staying true to 4.1, the pattern instruction,  
18 so we were okay with all of the changes made in this.

19          MR. CURLEY: I am sure they are.

20          THE COURT: We can take it page by page, I guess.

21          MR. BLICKENSDETFER: I wasn't going beyond this page.

22          THE COURT: Plaintiff is okay with this page.

23          So, tell me the first place where the Defendant has a  
24 problem.

25          MR. CURLEY: Line four, begin with the underlined



1 Professor Tracy's, and then start there, speech, including  
2 speech he made online on his blog.

3 *THE COURT:* What would the Defense be offering  
4 alternatively?

5 *MR. CURLEY:* Assuming we get past the motions that  
6 were made.

7 *THE COURT:* That is all we are doing right now, on  
8 that assumption.

9 *MR. CURLEY:* The claim is, and I don't mean to be  
10 cavalier about this, the claim is blog speech. I am trying to  
11 think how I am going to describe that in my closing argument,  
12 it is blog speech, which we don't think identifies any speech,  
13 but that is the allegation, and I think that is what was in the  
14 statement of the case, not to say I agree with it, but it is  
15 what it is.

16 So, I guess blog speech, whatever that might be.

17 *THE COURT:* Tell me specifically what change you are  
18 proposing so I am clear.

19 *MR. CURLEY:* Professor -- Professor Tracy's blog  
20 speech. Again, with all of our objections noted and on the  
21 record.

22 *THE COURT:* Yes, yes, all of the objections are noted,  
23 so I -- no one is waiving any objections, and I haven't made my  
24 final rulings. We are proceeding on the assumption that the  
25 Court made rulings as to the public, private, public concern,

1 Pickering, denying Judgment as a Matter of Law. Take all of  
2 that into account, all the Court's rulings all made. Now we  
3 are at the final stages of getting the right language.

4 MR. CURLEY: We heard about Facebook, Twitter, and all  
5 kinds of stuff. When I see things like that in the jury  
6 instruction that opens the door for the other side to be  
7 arguing in the closing argument that all of that is in play and  
8 all of that is a legitimate comparator. That is a different  
9 issue, but we take issue with that and I don't want to open the  
10 door to that.

11 THE COURT: What do you propose, then? Do you want to  
12 look back at the opening statement, the summary of the case?

13 MR. CURLEY: No. You stated the objections are  
14 reserved. Every time I say this, I think I need to say  
15 something about blog speech.

16 THE COURT: You would have it be because of Professor  
17 Tracy's blog speech?

18 MR. CURLEY: Period.

19 THE COURT: Delete "including speech he made online on  
20 his blog."

21 MR. CURLEY: Yes. Speech on his blog is sort of okay  
22 with all objections observed.

23 THE COURT: You are okay with it the way it is?

24 MR. CURLEY: No, no. It has to be blog something  
25 because that is as close as they have come. That is the

1 allegation here. It is not online stuff, it is not Facebook,  
2 it is not Twitter, it is not anything but what he wrote on his  
3 blog.

4 *THE COURT:* Because of Professor Tracy's blog speech,  
5 period.

6 Any objection from the Plaintiff?

7 *MR. BLICKENSDERFER:* Yes. I think the Court and jury  
8 heard testimony that included social media speech. The Court's  
9 statement at the beginning was Plaintiff's speech. I think the  
10 correct terminology would be including blogging. We heard  
11 speech on his podcast, speech in a book. It would be overly  
12 narrowing saying blogging.

13 The Defendant included a book, podcast, they can make  
14 this argument to the jury, but I think it is accurate to say  
15 his speech, including his blogging. If the Court wants to say  
16 blogging, we felt it best to say speech he made online,  
17 including on his blog. We were fine with that change.

18 *THE COURT:* Let me take a closer look at it.  
19 Plaintiff is okay with it, Defendant would have it read, in  
20 this case Professor Tracy claims that FAU, through its  
21 officials while acting under color of state law, intentionally  
22 deprived him from -- because of Professor Tracy's blog speech,  
23 period. That is what the Defendant would have.

24 Plaintiff is fine with the way it is written, which is  
25 noted because it is in Court Exhibit 1 and 2.

1           So, next paragraph, any issues from Defense?

2           What is the next issue on this page, if any, from  
3 Defense?

4           *MS. HUFF:* The next issue is in the second full  
5 paragraph, again, on the same point, but when we -- we want it  
6 to refer to blog speech.

7           *THE COURT:* Point me to the particular --

8           *MS. HUFF:* The first sentence of the second full  
9 paragraph: FAU denies that it took action against Professor  
10 Tracy in retaliation for his blog speech.

11          *THE COURT:* You want blog in there?

12          *MS. HUFF:* Yes, and throughout, so we are talking  
13 about the blog speech only.

14          *THE COURT:* It is there and --

15          *MS. HUFF:* One, two, three, four, five -- six lines up  
16 from the bottom.

17          *THE COURT:* You would have it read regardless of his  
18 blog speech.

19          *MS. HUFF:* Yes.

20          *THE COURT:* Anywhere else?

21          *MS. HUFF:* Not on this page.

22          *THE COURT:* Plaintiff's position on that?

23          *MR. BLICKENSDETFER:* Remains the same.

24          *THE COURT:* You're objecting.

25          *MR. BLICKENSDETFER:* Right.

1           *THE COURT:* Same argument as before?

2           *MR. BLICKENSDERFER:* We are fine with the way it was  
3 written.

4           *THE COURT:* Okay. Any other objection on that page  
5 from Defendant.

6           *MS. HUFF:* No, your Honor.

7           *THE COURT:* Okay. All right. We will take a look at  
8 that.

9           The next page, any objection from Plaintiff?

10          *MR. BLICKENSDERFER:* No. We think maybe we can get  
11 rid of some of the elements depending how the Court rules  
12 tomorrow. We are fine the way it is currently and the way it  
13 is argued.

14          *THE COURT:* From Defense.

15          *MS. HUFF:* We agree we can get rid of some of the  
16 elements. First, officials actions under color of state law,  
17 we are willing to stipulate to this. We do want to talk about  
18 decision makers, it is not relevant to this element, but we do  
19 want an instruction on decision makers.

20          *THE COURT:* Have you submitted that?

21          *MS. HUFF:* Yes.

22          *THE COURT:* Both of you would have me scratch out  
23 first -- the whole first line; is that right?

24          *MR. BLICKENSDERFER:* As currently written, it says on  
25 the next page the parties stipulated. We can do it that way or

1 completely omit that.

2 *THE COURT:* Do you have a preference?

3 *MR. BLICKENSDERFER:* I like to stay true to the  
4 pattern, it is safer.

5 *THE COURT:* I tend to stick to the pattern. If there  
6 is an agreement to do something other than the pattern, I am  
7 always open to that.

8 The first element, officials' actions under state law,  
9 under color of state law, you should accept that as true and a  
10 proven fact. I don't think we have it on the verdict form,  
11 right?

12 *MR. BLICKENSDERFER:* Correct.

13 *THE COURT:* What do you think?

14 *MR. CURLEY:* We object to that. We don't contest that  
15 and --

16 *THE COURT:* You object to what?

17 *MR. CURLEY:* That element being in there. It is not  
18 an element and it is not contested and we will be talking about  
19 decision makers, and we think this causes confusion in the mind  
20 of the jury, particularly in the absence of a decision-maker  
21 instruction.

22 When you are telling them FAU's official actions were  
23 under the color of state law, we need to know who we are  
24 talking about and who the decision makers were here.  
25 Instructing the jury on something like this, although it might

1 be a pattern instruction, in the absence of another  
2 instruction, we believe it is confusing. We want that out.

3 We don't contest it, it doesn't need to be there.

4 *THE COURT:* And on the next page, you would have that  
5 sentence that says the parties have agreed that FAU's officials  
6 acted under color of state law. Would you keep that in?

7 *MR. CURLEY:* I would leave that out.

8 *THE COURT:* Plaintiff's position.

9 *MR. BLICKENSDERFER:* Let's stick to the pattern in  
10 light of the Defendant's insistence that they get an extra  
11 instruction on the decision-maker's role. That is covered by  
12 pattern 4.1.

13 Your Honor, it is my understanding they are referring  
14 to employers' reason for discharging.

15 *THE COURT:* Is that what you are referring to?

16 *MS. HUFF:* Sorry, your Honor, it is entitled  
17 employer's reasonable discharge decision.

18 *THE COURT:* Okay, got it.

19 So, anything else on the page that talks about the  
20 elements. I am going to take these under advisement.  
21 Defendant wants it out for that first element and Plaintiff  
22 wants it in because it is pattern. Let's go through the rest  
23 of it.

24 Anything else from the Plaintiff first?

25 *MR. BLICKENSDERFER:* On the rest of that page?

1           *THE COURT:* Yes.

2           *MR. BLICKENSDETFER:* No.

3           *THE COURT:* Acceptable to the Plaintiff?

4           *MR. BLICKENSDETFER:* Yes.

5           *THE COURT:* Defense.

6           *MS. HUFF:* We have the same position stated  
7 previously. This is speech.

8           *THE COURT:* How should it be written?

9           *MS. HUFF:* Professor Tracy authored blog speech.

10          *THE COURT:* Period?

11          *MS. HUFF:* Yes.

12          *THE COURT:* That is the Defendant's position. And the  
13 Plaintiff's view on that?

14          *MR. BLICKENSDETFER:* Remains the same.

15          *THE COURT:* I am trying to get everything now a matter  
16 of record at this point and positions and why, and I will  
17 digest it and we will have more time to talk about it certainly  
18 tomorrow.

19               Anything else from Defendant on the page we are on  
20 right now?

21          *MR. CURLEY:* It is the Court's intention to address  
22 the issues in the footnote, right? It is deleted in ours, the  
23 Court scratched it out.

24          *THE COURT:* About the whole public concern -- yes,  
25 that is exactly what I said. Let's be clear.



1           As the Court reads the case law under Moss versus City  
2 of Pembroke Pines, it makes that determination at the close of  
3 evidence. I am waiting to make that determination when the  
4 case is closed.

5           It is now on a ruling the Court will make and must  
6 make when the evidence is closed.

7           MR. CURLEY: The third element, we don't contest that  
8 you could take that out. We all know he was terminated from  
9 the employment.

10          THE COURT: The Plaintiff's position.

11          MR. BLICKENSDETFER: That is fine, your Honor. I  
12 think there is a corresponding finding on the verdict form we  
13 could take off as well.

14          THE COURT: The Plaintiff and Defendant agree this  
15 goes out, and then we go to the verdict form and you would  
16 suggest number two would come out altogether, right, that  
17 question? That FAU discharged Professor Tracy from employment,  
18 that comes out altogether?

19          MR. BLICKENSDETFER: Yes.

20          THE COURT: Defense.

21          MS. HUFF: Yes, your Honor.

22          THE COURT: Okay. Let's make that note. And then  
23 four?

24          MS. HUFF: Yes, your Honor, we would ask that it read  
25 Professor Tracy's speech was a substantial motivating --

1 Professor Tracy's blog speech was a motivating factor. That is  
2 consistent with the case law. Substantial motivating factor.

3 *THE COURT:* Tell me again, Professor Tracy's speech  
4 was a --

5 *MS. HUFF:* Blog speech was a substantial motivating  
6 factor in FAU's decision to discharge Professor Tracy.

7 *THE COURT:* That is Defendant's position, and that is  
8 based on what?

9 *MS. HUFF:* There are Eleventh Circuit cases that we  
10 could cite that use the language "substantial motivating  
11 factor," Moss, 782 F.3d 613, Eleventh Circuit, 2015.

12 *THE COURT:* We have the Moss case.

13 *MS. HUFF:* Vanderwall, an Eleventh Circuit, 2016 case,  
14 661 Federal Appendix 581, 585, and the quote is the third  
15 stage --

16 *THE COURT:* I will look at that.

17 Was there a third case?

18 *MS. HUFF:* Morgan versus Ford, Eleventh Circuit, 1993,  
19 6 F.3rd 750, 754. All three of those cases use the language  
20 "substantial motivating factor" and significantly do not say  
21 substantial or, it uses the word "substantial" to modify  
22 motivating, and we think it is necessary that we have a jury  
23 instruction to read as these three cases.

24 *THE COURT:* What is the pattern on this one?

25 *THE LAW CLERK:* The pattern is 4.1, I think.

1           *THE COURT:* 4.1.

2           *MR. BLICKENSDETFER:* Your Honor, in the annotations to  
3 4.1, causation, there is a discussion as to this very issue.

4           *THE COURT:* Yes, the fourth element in 4.1 does say  
5 was a motivating factor and which --

6           *MR. BLICKENSDETFER:* In the annotations, under  
7 elements and defenses, Roman numeral D, causation, I direct the  
8 Court to the last full paragraph. To eliminate substantial  
9 confusion -- pattern instruction 4.1 charges that the protected  
10 speech must be a motivating factor in the end situation. The  
11 pattern instructions clearly resolved this issue, and there is  
12 no need to add that modifier.

13           *MS. HUFF:* We believe the pattern instructions are  
14 outdated on this point. 2015 and '16 cases, that is Moss and  
15 Vanderwall, use the phrase "substantial motivating factor."  
16 The Eleventh Circuit appears to be moving in that direction, or  
17 already had moved in that direction.

18           *THE COURT:* And the instructions we are working off of  
19 are 2013.

20           *MS. HUFF:* Yes.

21           *THE COURT:* That is the most current?

22           *MR. BLICKENSDETFER:* Yes.

23           *THE COURT:* All right. As long as I understand your  
24 positions on that, I will take a closer look at it and the  
25 three pages and arguments.

1           That takes care of that page.

2           The next page is the one that begins with what used to  
3 be five, but with the clean version it begins, within the  
4 verdict form that I will explain in a moment you will be asked  
5 to answer questions about these factual issues.

6           We already know the Defendant wants the next paragraph  
7 out. The parties agree FAU officials -- Plaintiff wants it in  
8 because it is consistent with the pattern, and the issue on the  
9 previous page.

10          From the Plaintiff, any objections to anything on this  
11 page?

12          *MR. BLICKENSDERFER:* Yes. We don't have any issue so  
13 long as we are consistent with the pretrial ruling on damages  
14 will be determined later. Other than that, no changes.

15          *THE COURT:* So, no objections?

16          *MR. BLICKENSDERFER:* Correct.

17          *THE COURT:* Defense.

18          *MS. HUFF:* We agree with the deletions in the first  
19 two paragraphs and note your Honor has agreed to delete --

20          *THE COURT:* Well, I haven't made any rulings yet, I  
21 noted that.

22          *MS. HUFF:* As for the second element, we are raising  
23 our objection again to how the speech his characterized. We  
24 would like it to read blog speech instead of authored speech,  
25 including online speech.

1           *THE COURT:* Blog in front of speech and everything  
2 else taken out or have that stay in?

3           *MS. HUFF:* You can't just insert blog speech in this  
4 instance and have it make sense. With the authored speech on  
5 his blog or through his blog.

6           *THE COURT:* Tell me what your proposed language is,  
7 and I will consider it over the evening so I can come back  
8 tomorrow.

9           *MS. HUFF:* We'll note it for the record, of course,  
10 but your Honor has ruled on this already, you will make the  
11 determination after the close of evidence.

12           *THE COURT:* Of course, of course, yes.

13           *MS. HUFF:* So, assuming that we get to this paragraph,  
14 if you find that Professor Tracy -- what do you think, authored  
15 speech?

16           *MR. CURLEY:* I am not sure what is the issue here.  
17 For the second element, if you find Professor Tracy -- let's  
18 say authored blog speech on matters such as his views on mass  
19 casualty events, school shootings and Government conspiracy,  
20 then you found he engaged in protected speech.

21           I am not sure if that is an issue or what that is  
22 supposed to be. It is confusing to me, your Honor.

23           Where is that taking us?

24           *THE COURT:* Well, it ties into -- let's see, this is  
25 for the second element.

1           MR. CURLEY: That is --

2           THE COURT: It says for the second element.

3           MR. CURLEY: I think this is yours, your Honor, and I  
4 am not sure it is appropriate to give this to the jury in any  
5 form. You are going to make findings, hopefully in our favor,  
6 but if you don't, the jury is going to be asked to determine  
7 why this guy is fired.

8           That is pretty much it. You said that in your summary  
9 judgment ruling. I don't know why -- I am not sure it is a  
10 good idea to talk to the jury about this kind of stuff. It is  
11 confusing.

12          THE COURT: And Plaintiff.

13          MR. BLICKENSDETFER: Your Honor, this is missing from  
14 their proposed instruction. It is following the pattern. If  
15 the Court ends up ruling on the issue, we could maybe agree to  
16 take out this element.

17          THE COURT: Well, I am going to rule on the issue.  
18 This was intended to be written as if I ruled on the issue and  
19 found that the Plaintiff was private -- in his private capacity  
20 speaking on a matter of public concern, and Pickering going in  
21 favor of the Plaintiff for purposes of drafting this draft.

22          If we work off that assumption, do we not think this  
23 is needed?

24          MR. BLICKENSDETFER: We actually do, that is in the  
25 pattern describing what the speech is. This is reading from

1 the pattern, from the second element, if you find that,  
2 brackets, name of Plaintiff.

3 *THE COURT:* Right, then you have found he or she is  
4 engaged in protected speech. It is right from the pattern.

5 *MR. BLICKENSDETFER:* Right.

6 *THE COURT:* The question is, all you do is insert the  
7 name of the Plaintiff and describe protected speech or conduct?  
8 That is the only debatable thing here, if the Court rules in  
9 the hypothetical scenario that it does.

10 Did I put the Plaintiff's name in correctly, and did I  
11 describe the protected speech and conduct? It comes from page  
12 42 of the pattern.

13 *MR. CURLEY:* Understood. If that is a contested  
14 issue, that would be good to have it in there. The way it will  
15 go, you will rule on whether it is protected speech or not, and  
16 then we are going to toss it to the jury to determine whether  
17 that is why this guy lost his job. So, why even have that  
18 discussion with the jury about them deciding this issue or  
19 weighing in on it. It is just not their issue, your Honor.

20 *THE COURT:* Well, let's see here.

21 *MR. CURLEY:* It might be in another case.

22 *THE COURT:* Page 51 of the pattern instructions, a  
23 threshold issue in most public employee freedom of speech cases  
24 is whether the employee engaged in protected speech.

25 Let me keep going.

1           In cases where there is a dispute whether the  
2 Plaintiff was speaking on a matter of public concern and not as  
3 part of his official duties, the instruction and verdict form  
4 should be adapted to cover this issue.

5           *MS. HUFF:* Your Honor, it does say that in some cases  
6 there could be a genuine fact dispute on the question.

7           If you rule that it is protected speech as a matter of  
8 law, I don't know that we dispute that he blogged.

9           There is no fact dispute to send to the jury on that  
10 point and it would be confusing to hear about it and think they  
11 had a determination to make on that.

12           *THE COURT:* So, the Defendant's position is, if the  
13 Court rules in favor of Plaintiff on the threshold issues that  
14 are before the Court, this is not necessary.

15           *MS. HUFF:* Correct, because you will have decided it  
16 is protected speech.

17           *THE COURT:* What about the Plaintiff?

18           *MR. BLICKENSDETFER:* Plaintiff agrees, and take off  
19 the question on the verdict form.

20           *THE COURT:* Plaintiff agrees and the corresponding  
21 question on the verdict form would be?

22           *MR. BLICKENSDETFER:* Question one, your Honor.

23           *THE COURT:* Question -- let's see where question one  
24 went. Did I lose question one?

25           Question one, that he authored speech, online speech



1 through his blog, mass casualty events -- you say that comes  
2 out.

3 *MR. BLICKENSDETFER:* Yes.

4 *THE COURT:* Does defense agree with that?

5 *MR. CURLEY:* Yes. It is going to be, in the end the  
6 jury is going to decide whether speech was the reason for his  
7 termination.

8 *THE COURT:* Both sides agree if the Court rules  
9 favorably for the Plaintiff on the threshold issues as those  
10 brought up in the Motion for Judgment as a Matter of Law, the  
11 paragraph for the second element, that comes out and so does  
12 question one on the verdict form.

13 *MR. BLICKENSDETFER:* Yes, your Honor.

14 *MS. HUFF:* Yes, your Honor.

15 *THE COURT:* Anything else on that page from the  
16 Plaintiff? The Plaintiff said it was acceptable.

17 *MR. BLICKENSDETFER:* No more changes.

18 *THE COURT:* From the Defense.

19 *MS. HUFF:* We would remove the sentence from the third  
20 element, we are not disputing that we discharged Professor  
21 Tracy from employment.

22 *THE COURT:* Does Plaintiff agree?

23 *MR. BLICKENSDETFER:* Yes.

24 *THE COURT:* Plaintiff and Defense agree to omit that.  
25 What about the fourth element?

1           *MS. HUFF:* For Defendant, we would like to add  
2 "substantial motivating factor" incorporating the same  
3 arguments we made previously to the Court, and in reference to  
4 Professor Tracy's speech, I would like to call it blog speech.

5           *THE COURT:* And was a substantial motivating factor,  
6 putting substantial back in, consistent with your other  
7 positions.

8           *MS. HUFF:* Yes, and it is referenced as protected  
9 speech, and we'd rather call it blog speech to be consistent  
10 with the rest of the instructions.

11           *THE COURT:* Okay, is that it for that page?

12           *MS. HUFF:* Yes.

13           *THE COURT:* The next page, FAU's decision. Back to  
14 the other page.

15           *MS. HUFF:* Two times it says protected speech, we  
16 wanted blog speech.

17           *MR. CURLEY:* Everywhere it says protected speech, we  
18 think that is prejudicial, say --

19           *MR. BLICKENSDETFER:* The pattern instructions start to  
20 use protected speech at a certain time, and we agree with the  
21 use of protected speech at the appropriate time after the  
22 speech has been described.

23           *THE COURT:* Right, and you agree -- maybe your  
24 position will remain the same. If the Court rules in the  
25 Plaintiff's favor, you both agree it reads -- for the second

1 element, that comes out, and that is the first place, I think,  
2 that the term "protected speech" is used.

3 So, is it still your position that the word  
4 "protected" would be used or not?

5 *MR. BLICKENSDETFER:* When in doubt, we will stick with  
6 the pattern. If that is what the pattern says, we will be most  
7 comfortable with that.

8 *THE COURT:* The Court will take that under advisement.

9 Moving on to the next page. I would like to start  
10 winding down, we will have another time to go through this  
11 tomorrow. We may not hear everything tonight.

12 This next page, FAU's decision, it begins with that  
13 page. Anything from the Plaintiff?

14 *MR. BLICKENSDETFER:* No objection.

15 *THE COURT:* Defense.

16 *MS. HUFF:* Yes, the first -- remainder of the first  
17 paragraph, similar objections that we have noted. Can I read  
18 the lines --

19 *THE COURT:* I think I understand. The same objection  
20 means blog, yes, protected, no, you don't want it, and you want  
21 substantially -- you want all of your substantially back in  
22 there.

23 *MS. HUFF:* Yes.

24 *THE COURT:* I will take a look at it in light of your  
25 argument and cases you cited to the Court.

1           Anything else on that page other than the blog,  
2           protected issue and substantial issue?

3           *MS. HUFF:* Yes, your Honor, towards the end the  
4           stricken language that begins, but FAU may discharge Professor  
5           Tracy for any reason, good, bad, fair, unfair, even based on  
6           mistaken facts, so long as it was --

7           *THE COURT:* Let me make sure I know where you are  
8           reading.

9           *MS. HUFF:* About five lines from the bottom beginning,  
10          FAU may discharge --

11          *THE COURT:* The one that has been deleted?

12          *MS. HUFF:* Yes. That is a correct statement of the  
13          law from Alvarez versus Royal Atlantic Developers, 610 F.3d  
14          1253, an Eleventh Circuit 2010 case. That case is one of the  
15          cases on pretext and discusses that an employment decision can  
16          be based on any reason, good, bad, fair, unfair, even based on  
17          mistaken facts, so long as it was not substantially motivated  
18          to retaliate for blog speech.

19          *THE COURT:* That is not the pattern.

20          *MS. HUFF:* No. The pattern has the language of good,  
21          bad, fair, unfair, and does not contain the language in  
22          Alvarez, that line "based on mistaken facts."

23          *THE COURT:* Defendant would have me add that back in  
24          based on Alvarez, recognizing it is not pattern. And the  
25          Plaintiff's position on that?

1           *MR. BLICKENSDETFER:* Stick to the pattern. If the  
2 Defendant wants to add that in their argument, they can do so.

3           *THE COURT:* Okay, what else on that page?

4           *MS. HUFF:* That is it for that page, your Honor.

5           *THE COURT:* Okay, and the next page?

6           *MS. HUFF:* In the first line, add substantially before  
7 motivated pursuant to our arguments presented earlier to the  
8 Court.

9           *THE COURT:* Okay.

10          *MS. HUFF:* The next few lines, any time it says  
11 protected speech we would like it to read blog speech.

12          *THE COURT:* So, yes, blog, no protected issue.

13          *MS. HUFF:* Any time motivating factor is mentioned we  
14 would like to add substantial.

15          *THE COURT:* Substantial added to motivating, okay.

16          *MS. HUFF:* And then there is stricken language towards  
17 the end of the page that we would like added back in. Again,  
18 that was a pretext instruction, that is important to the  
19 causation element. That is a correct statement of the law.  
20 Alvarez is also the predominant case on this subject, you have  
21 to consider -- on pretext, it is the employee's burden. There  
22 is a burden shifting element going on there.

23          *THE COURT:* You are relying on Alvarez, you  
24 acknowledge it is not pattern?

25          *MS. HUFF:* There is a pretext element to the pattern

1 instruction, but it is not as spelled out as we would like it  
2 from the language in Alvarez, which makes it clear that an  
3 employee cannot succeed by simply quarreling with the wisdom of  
4 the --

5 *THE COURT:* Okay, and then the Plaintiff's position,  
6 the same as before, pattern?

7 *MR. BLICKENSDETFER:* Yes, your Honor, if the Court is  
8 maybe being aware that the Defendant keeps adding the same  
9 thing again and again, it is getting prejudicial. If they get  
10 one, it is not the pattern, but they continue to still want the  
11 same thing, it is going to get prejudicial.

12 *THE COURT:* Okay, the next page. Plaintiff.

13 *MR. BLICKENSDETFER:* Yes, your Honor, this was in an  
14 effort to try to anticipate the damages. This is before we  
15 discussed it pretrial.

16 We are okay, pursuant to our discussion at pretrial,  
17 and we have no objection to the rest.

18 *THE COURT:* Defense.

19 *MS. HUFF:* We are fine with the first paragraph being  
20 removed. As to the second paragraph, we agree with the  
21 deletion of the word that, and agree with the deletion of and  
22 determine that his blog speech was a substantial motivating  
23 factor for his termination.

24 The language we would like changed is the reference to  
25 Professor Tracy's protected activity, that is inconsistent with

1 the rest of the instruction.

2 THE COURT: What would you like?

3 MS. HUFF: Blog speech.

4 THE COURT: Plaintiff's position.

5 MR. BLICKENSDETFER: We like it the way it is.

6 THE COURT: Okay.

7 MS. HUFF: Last sentence, we would like it blog speech  
8 instead of protected speech.

9 THE COURT: Blog speech instead of protected.

10 I am assuming Plaintiff objects.

11 MR. BLICKENSDETFER: Yes.

12 THE COURT: Anything else?

13 MS. HUFF: No, your Honor, not on this page.

14 THE COURT: So, here is what we are going to do.  
15 Skipping two pages for a second.

16 I am skipping the one employer's reason for discharge  
17 decision and jury instruction number which is -- everything is  
18 deleted on that page, Plaintiff proposed that is a special  
19 instruction, and the one before that special instruction by the  
20 Defendant.

21 Let me skip ahead. Election of foreperson,  
22 explanation of verdict form, any objection to that?

23 MR. BLICKENSDETFER: No, your Honor.

24 MS. HUFF: No.

25 THE COURT: And on the verdict form, again, if we are

1 assuming again -- just as we proceeded with the way we have  
2 gone about the jury instructions with rulings as we  
3 hypothetically have discussed, we have question number one, I  
4 think, has come out.

5 *MS. HUFF:* Yes, your Honor.

6 *THE COURT:* Okay. So no question number one.  
7 Question number two has come out.

8 *MR. BLICKENSDETFER:* Yes.

9 *THE COURT:* So, the next one would be the next  
10 question, and I am assuming that -- is it okay with the  
11 Plaintiff what is written?

12 *MR. BLICKENSDETFER:* Yes.

13 *THE COURT:* Defense would have the Court add something  
14 like it was a substantial motivating factor.

15 *MS. HUFF:* Yes.

16 *THE COURT:* That is Defendant, Plaintiff objects.

17 *MR. BLICKENSDETFER:* Yes.

18 *THE COURT:* The next question, is that okay with the  
19 Plaintiff?

20 *MR. BLICKENSDETFER:* Number five?

21 *THE COURT:* Yes.

22 *MR. BLICKENSDETFER:* Yes, we are fine with that.

23 *THE COURT:* From Defense?

24 *MS. HUFF:* Consistent our argument, we would like it  
25 to read blog speech.



1           *THE COURT:* Okay, and then the next page is okay.

2           *MR. BLICKENSDERFER:* Yes.

3           *MS. HUFF:* Yes.

4           *THE COURT:* So, here is what we are going to do. It  
5 is late, and I want to make sure we don't over tax everybody  
6 here.

7           We are going to break right now, I will take what you  
8 said under advisement. You have been heard on all issues  
9 except each of your proposed specials. The Plaintiff has one,  
10 employer's proposed reason for discharge -- that is the  
11 Defendant's and the Plaintiff has one. Do you still want that?

12           *MR. BLICKENSDERFER:* It will hinge on the Court's  
13 ruling.

14           *THE COURT:* If the Court rules one way it will be  
15 requested. If the Court rules in a different way it won't be.

16           *MR. BLICKENSDERFER:* Correct.

17           *THE COURT:* Either way, Defense wants that special,  
18 employer's reason for discharge decision.

19           *MS. HUFF:* Yes, your Honor.

20           *THE COURT:* Let's come tomorrow early.

21           What is a reasonably early hour to ask you to come to  
22 take up that -- can we have everybody here at 8:00?

23           *MS. HUFF:* Yes, your Honor.

24           *THE COURT:* Okay, all right. Let's have you come at  
25 8:00 tomorrow. We will see everybody at 8:00 and we will

1 continue the conversation. The doors are open at 8:00.

2 Whenever you can make it, fine.

3 Thank you, have a good night. I appreciate your time.

4 (Thereupon, the Court was recessed.)

5 \* \* \*

6 I certify that the foregoing is a correct transcript  
7 from the record of proceedings in the above matter.

8  
9 Date: January 1, 2018

10 /s/ Pauline A. Stipes, Official Federal Reporter

11 Signature of Court Reporter  
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Pauline A. Stipes, Official Federal Reporter

<p><b>MR. BENZION: [98]</b> 12/14  15/21 22/20 22/25 23/3 23/18  24/13 43/21 44/20 45/2 45/5  45/8 45/13 45/18 47/3 47/5  58/24 59/2 59/4 59/6 59/20  60/24 63/4 63/11 65/14 65/16  66/5 66/13 66/15 67/17 67/20  67/25 68/2 68/14 69/15 70/20  70/24 71/1 71/4 71/6 71/8  72/7 72/18 72/24 132/8  132/12 132/14 132/17 132/21  132/24 133/2 133/7 133/11  134/6 134/12 134/15 134/24  135/12 135/15 135/18 135/24  136/2 136/6 136/11 136/21  137/1 137/14 137/22 138/15  138/17 138/25 139/4 139/19  140/2 140/9 140/12 140/14  142/1 142/3 142/14 142/17  143/11 144/24 145/17 146/10  146/14 146/18 147/18 148/6  149/1 155/11 155/15 155/18  156/13 156/15 156/20 157/1  157/3  <b>MR. 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